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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-229

MARSHALL P. SAFIR,

Petitioner,

—v.—

ROBERT W. BLACKWELL, Assistant Secretary of Commerce for Maritime Affairs, Successor to and Substituted for ANDREW GIBSON; JAMES S. DAWSON, JR., Secretary Maritime Subsidy Board and FREDERICK DENT, Secretary of Commerce, Successor to and Substituted for MAURICE STANS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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August 3, 1973

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IN THE

Supreme Court of the United States

October Term, 1973

No. .....

MARSHALL P. SAFIR,

Petitioner,

—v.—

ROBERT W. BLACKWELL, Assistant Secretary of Commerce for Maritime Affairs, Successor to and Substituted for ANDREW GIBSON; JAMES S. DAWSON, JR., Secretary Maritime Subsidy Board and FREDERICK DENT, Secretary of Commerce, Successor to and Substituted for MAURICE STANS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on May 16, 1973 (App. #1, p. 1).

Opinions Below

The first opinion of the Court of Appeals is reported at 417 F.2d 972 (1969) (App. #12, pp. 163a-173a). The second opinion of the Court of Appeals is reported at 432 F.2d 137, 142 (1970), *cert. denied,* 400 U.S. 972 (App. #11, pp. 151a to 162a). The third decision of the Court of Appeals is not yet reported but is listed herein as Appendix Exhibit 9 on pages 142a-144a. The fourth decision appears herein as Appendix #1, p. 1.

The recent opinions of the United States District Court for the Eastern District are unreported. They are listed here as Appendix Exhibit 8, pp. 138a-142a and Appendix Exhibit 10, pp. 145a-150a.[1]

Jurisdiction

The judgment of the Court of Appeals was entered on May 16, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Statute Involved

Section 810 of the Merchant Marine Act, 1936, 49 Stat. 2015, 46 U.S.C. 1227 (App. Ex. 14, p. 197a).

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[1] These decisions are sequals to earlier decisions in Docket 68 C 643 U.S.E.D.N.Y. reported *sub. nom Safir* v. *Gulick,* 297 F. Supp. 630 (E.D.N.Y. 1969), *reversed sub. nom, Safir* v. *Gibson,* 417 F.2d 972 (2d Cir. 1969) and which forms part of this petitioner's appendix in Petition #388—1970 (400 U.S. 972, *cert. denied*).

Question Presented

After an adjudicatory hearing (Docket S 243) mandated by the United States Court of Appeals, the Maritime Subsidy Board, the agency entrusted with the responsibility and endowed with the expertise,[2] has found after exhausting the administrative process that 46 U.S.C. 1227 was violated by all subsidized members of a steamship conference (AGA FBO).[3]

The question is whether the Maritime Administration and Maritime Subsidy Board through the respondent officials are now under a mandatory duty imposed by Section 810 of the Merchant Marine Act 1936, 46 U.S.C. 1227, to invoke the sanction of the Act by recovering all operating differential subsidies paid to these companies during the eleven month period of violation.[4]

Statement of the Case

This case was first brought to this Court by this petitioner three years ago as Petition #388 of the October Term, 1970. At that time the petition was denied based primarily on the prematurity of its posture. "The administrative process, far from being exhausted, had hardly begun." *Mr. Justice Douglas, however, was of the opinion that certiorari should have been granted at that time.* It is no small irony

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[2] Primary responsibility for administration of the Act is vested in the Secretary of Commerce by Reorganization Plan No. 7 of 1961, 75 Stat. 840 and delegated by him to the Maritime Administration and Maritime Subsidy Board, 27 Fed. Reg. 3637 (1962).

[3] Appendix Exhibit A, pp. 15a-87a.

[4] The Secretary of the Maritime Subsidy Board has by certified attachment (See App. Exhibit 5, p. 122a) set forth the amount of these recoveries.

that this Court, during that same term, decided the case on which this petitioner leans heavily to support his contention that the Court of Appeals was in error in granting wider and wider discretion to the Maritime Subsidy Board in a situation where there was specific "law to apply." [5]

The time that has elapsed since then has not wanted for legal activity—in the past three years the following actions took place:

1. In May 1971 after a *"prima facie"* finding by the hearing examiner in S 243 that Sapphire Steamship Lines met all the criteria necessary to qualify for the protection of Section 810, this petitioner moved in United States District Court, Eastern District of New York, for an injunction to prevent payment of $80 million of past subsidies to the violators pending the administrative agency's decision in S 243. Judge John Dooling, in part, granted injunction (App. Ex. 10, pp. 145a-150a). By the time the relief was effective, however, payment of all but $1 million had been paid to the violators.

2. In May, 1972, an "initial" decision by the Hearing Examination (by this time the Chief Administration Law Judge) issued wherein he found that the so-called "Trade Respondents" had violated Section 810 and recommended certain subsidy recoveries he felt within the discretion of the agency to formulate based on the Court of Appeals mandate [6]—albeit 13 months after this Court's decision in *Citizens to Preserve Overton Park* v. *Volpe*. This petitioner moved in the District Court for an order requiring the Secretary of Commerce to escrow all amounts payable to

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[5] *Citizens to Preserve Overton Park, Inc.* v. *Volpe* (App. 13, p. 175a).

[6] See, App. Ex. A, pp. 36a-37a, Dated April 16, 1973 as it conflicts with App. Ex. 13, pp. 183a-187a, Dated March 2, 1971.

certain of the violators in the sale of their passenger ships pending a "final" decision by the Maritime Subsidy Board in S 243. Judge Dooling denied the motion (See App. Ex. 8, pp. 138a-141a). Petitioner then appealed to the Second Circuit not only for the escrow of the funds but because his right to participate with the United States in the recoveries was threatened by Judge Dooling's questioning of his standing under 31 U.S.C. 231, 232 (see App. Exs. 6 and 7, pp. 124a-137a).

The Court of Appeals affirmed but left open the question of petitioner's rights under 31 U.S.C. 231, 232. The decision contained a broad implication of a wider discretionary grant to the agency to minimize both the amount of recovery from the violators and to reduce the number of lines in the culpable group.[7]

On April 16, 1973 the final decision of the Maritime Subsidy Board in S 243 was served (App. Ex. A).

The Board found that all respondents violated Section 810 and then exercised the discretion it felt the Court of Appeals had granted by mitigating the penalties to an inconsequential level. Petitioner then on April 27, 1973 moved the Court to set aside the discretionary conclusions 2A through 2F of the decision (see App. Ex. 3, pp. 11a-14a and App. Ex. 2, pp. 2a-3a). The Court of Appeals denied (App. Ex. 1, p. 1) hence this petition.

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[7] App. Exhibit 9, page 143—"The judge's (Dooling), order was well within his discretion; he was not bound to accept plaintiff's assertions that the recoveries will run vastly beyond the sums recommended by the Chief Hearing Examiner in respect of *three* of the *four* ship operator defendants." However, respondent Dawson certified a payment of $149,610,000 in ODS funds during the period of violation (App. Ex. 5, p. 122a). Hearing examiner recommended ODS recovery of only $6,690,000, and this from "trade" defendants only, as he found no violation against "non-trades" (App. Ex. A, p. 19a).

Reason for Granting the Writ

The primary reason is that the Court of Appeals' interpretation of Section 810 in its decision 417 F.2d 972, 1969 and in its decision 432 F.2d 137, 142, 1970, and its decision in Docket 72-1753 unreported, granted broader and broader discretion by word and implication to the Government, and that this discretion so granted is in direct conflict with the decision of the Supreme Court in *Citizens to Preserve Overton Park, Inc.* v. *Volpe, Secretary of Transportation,* decided March 2, 1971 (App. Ex. 13, pp. 183a-186a).

In 417 F.2d 972 (1969) the Court of Appeals granted a measure of discretion to the Administrator under APA 5 U.S.C. 701 *et seq.* by stating that the requirements for the recovery for past subsidies by the Government may be "less absolute" than to cease payment to current violators and followed this in its sequel decision 432 F.2d 137, 142 (1970) wherein it granted wider discretion by stating "nothing we have said should be read as preventing the Maritime Administration from investigating the nature and extent of the individual carriers participation in the illegal action, should it find these matters relevant to its ultimate decision on *whether* to seek the recovery of subsidies paid during the violation and if so, how much and from whom" (see App. Ex. 11, p. 162a). As has been noted previously Maritime Subsidy Board's discretion was further broadened by implication in its *per curiam* decision in Docket 72-1753 of November 29, 1972.

"Overton" holds that under the Administrative Procedure Act the exception for action committed to agency discretion is only "applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply'." (See App. Ex. 13, pp. 183a-184a).

Seciton 810 (46 U.S.C. 1227) states in pertinent part:

> "No payment or subsidy of any kind shall be paid directly or indirectly out of the funds of the United States or any agency of the United States to any contractor who shall violate this section."

This language (to paraphrase *Overton*) is a plain and explicit bar to use of federal funds for all subsidy payments for at least the period of violation. At this point it should be noted that the Solicitor General in his brief in opposition to this petitioner's earlier Petiiton for Certiorari #388—1970 stated "the penalty created by Section 810 is *inflexible* as it bars all subsidy payments for at least the period of violation" (see App. Ex. B, p. 98a).

Petitioner agrees to this description and definition but disagrees with the Solicitor General's belief in the Board's discretion to invoke the remedy. In fairness, however, his brief in this case preceded the *Overton* decision by seven months, perhaps this view is no longer held. But, even assuming *arguendo,* the availability of such discretion, by invoking sanctions against five violators in Conclusion #2 (Ex. A, pp. 86a-87a) certainly the *inflexibility* of the sanction demanded full recovery from these contractors in accordance with the definition no longer in conflict.

Petitioner believes, however, that as stated in Exhibit 3, p. 13a "continuing as a party and conforming" was no mere technicality and the remaining (non-trade) violators are ensnared by the fact that the language of the statute is clear as to them and there is law to apply.

Yet, despite the clarity of the statutory language the Second Circuit Court of Appeals created in 417 F.2d 972 (1969) a rationalization for avoiding the hard command of the statute which this Court in *"Overton"* has rejected. Judge Friendly's opinion was based on the premise that the general policy of the Merchant Marine Act 1936 to promote the welfare of the Merchant Marine conflicted with Section

810 and required reconciliation by allowing the Secretary of Commerce to engage in a wide range balancing of competing interests.[8]

But, as is stated in *"Overton"* no such wide ranging endeavor was intended by the statute. If Congress intended general policy factors to be on equal footing with the protection of an unsubsidized American business enterprise from destruction by subsidized American citizens acting in concert there would have been no need for Section 810 at all. This protection was paramount. As Judge Friendly fully recognized in the 1969 opinion "The primary concern manifested by the Congress in the legislative history of 46 U.S.C. 1227 was with the added burden which subsidies imposed on the competitive position of the victim." When these public monies are used to assist some citizens to hurt others in a manner inimicable to the interests of the United States the penalty for the evil at which Section 810 was aimed is explicit and mandatory.

> **"Plainly there is law to apply and thus the exemption for action committed to agency discretion is inapplicable" (*"Overton"*, Ex. 13, p. 186a). The sanction of Section 810 should be invoked in full.**

CONCLUSION

For the reasons set forth above the petition for certiorari should be granted.

Respectfully submitted,

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August 3, 1973

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[8] Re Congressional intent see Docket A 17 (Ex. C, pp. 112a-113a).

SUPREME COURT, U. S.

AUG 2 1973

MICHAEL RODAK, JR., CLERK

IN THE

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October Term, 1973

No. 73-229

MARSHALL P. SAFIR,

Petitioner,

—v.—

ROBERT W. BLACKWELL, Assistant Secretary of Commerce for Maritime Affairs, Successor to and Substituted for ANDREW GIBSON; JAMES S. DAWSON, JR., Secretary Maritime Subsidy Board and FREDERICK DENT, Secretary of Commerce, Successor to and Substituted for MAURICE STANS,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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EXHIBIT 1

United States Court of Appeals

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 16th day of May, one thousand nine hundred and seventy three.

MARSHALL P. SAFIR, ARNOLD WEISSBERGER and SAPPHIRE STEAMSHIP LINES, INC.,

Plaintiffs-Appellants,

—v.—

ANDREW GIBSON, Acting Maritime Administrator, Maritime Administration, United States Department of Commerce, JAMES S. DAWSON JR., Secretary, Maritime Subsidiary Board, Maritime Administration, United States Department of Commerce, and MAURICE STANS, Secretary of Commerce of the United States,

Defendants-Appellees.

Order, Dated May 16th, 1973

It is hereby ordered that the motion made herein by Martin Safir, Esq. appellant by notice of motion dated April 27, 1973, to recall the mandate; and to reverse and set aside Conclusions of the Maritime Administration and Maritime Subsidiary Board and remand to the United States District Court for the Eastern District of New York with directions be and it hereby is denied.

HENRY J. FRIENDLY
STERRY R. WATERMAN
IRVING R. KAUFMAN
Circuit Judges

EXHIBIT 2

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 33389/90/91

MARSHALL P. SAFIR,

Appellant,

—against—

BLACKWELL-STANS, et al.,

Appellees.

REPLY OF APPELLANT MARSHALL P. SAFIR TO THE GOVERNMENT'S OPPOSITION TO HIS MOTION

Appellant wishes to point out that his motion filed April 27, 1973 under Rule 27(B) specifically avoided any Review of Agency Procedure under Title IV rules 15 to 20 of FRAP or any other form of judicial review in the District Court or the Court of Claims.

The motion under 27(B) goes simply to the question whether, once a finding of violation has been proved, the recovery of all ODS paid during the 11 month period to the violators is mandatory or discretionary. It is a natural consequence of *this* Court's mandate in Docket 33389/90/91.

Nor does this Court or this appellant need any enlightenment with respect to 46 CFR 202.1 (see Exh. (D) p. 20a) from the U.S. attorney—especially in view of his presumed lack of knowledge of the most recent development therein.

EXHIBIT 2

Reply of Appellant Marshall P. Safir to the Government's Opposition to his Motion

The Secretary of Commerce's position in regard to 46 CFR 202.1 has as recently as April 4, 1973 been telescoped by a decision in *American Maritime Association* v. *Blackwell, et al.,* by Federal District Judge Aubrey Robinson in the D.C. Circuit. Appellant submits as Exh. (E) a page from the Congressional Information Bureau report of April 6, 1973 on this decision.

It is obvious from this exhibit and from Exh. (F) submitted herewith and received only today that the April 16, 1973 order of the Maritime Subsidy Board at page 70 and as "clarified" by Exh. (F) are lame attempts to counteract the loss on April 4, 1973 of the additional *administrative* review time heretofore available prior to Judge Robinson's decision.

It is also obvious that the U.S. attorney would gain *judicial* review time for his procrastinating client if he could convince this appellant in his ignorance as a layman acting pro se., to start new actions in other courts. The fish will bite no longer.

Instead appellant finds Rule 27(B) the proper channel to pose his simple question and be granted his relief.

The gratuitous memoranda submitted by the violators who "had been sedulously abstaining" (p. 19a Exh. (D) from intervening in Docket 33389/90/91 *in limine* are irrelevant and hence ignored.*

Respectfully submitted,

MARSHALL P. SAFIR, Pro Se.

May 10, 1973

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* Although the correlation of page 2 of the "non-trade" memorandum filed May 7, 1973 and Exh(F) written May 8, 1973 is embarrassingly obvious and tempts comment.

EXHIBIT D — Annexed to Foregoing Reply Brief

Opinion of the Court of Appeals on Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 552—September Term, 1969.
(Decided June 18, 1970.)

Docket No. 34355

MARSHALL P. SAFIR, ARNOLD WEISBERGER and SAPPHIRE STEAMSHIP LINES, INC.,
Plaintiffs-Appellants,

—v.—

ANDREW GIBSON, Successor to and Substituted for JAMES W. GULICK, Acting Maritime Administrator, Maritime Administration, United States Department of Commerce, JAMES S. DAWSON, JR., Secretary, Maritime Subsidy Board, Maritime Administration, United States Department of Commerce, and MAURICE STANS, Successor to and Substituted for C. R. SMITH, Secretary of Commerce of the United States,
Defendants-Appellees,

AMERICAN EXPORT ISBRANDTSEN LINES, INC., BLOOMFIELD STEAMSHIP CO.; LYKES BROS. STEAMSHIP COMPANY, INC.; MOORE-MCCORMACK LINES, INC.; UNITED STATES LINES, INC., AMERICAN PRESIDENT LINES, LTD.; PRUDENTIAL STEAMSHIP CO., INC. and PRUDENTIAL GRACE LINES, INC.; and FARRELL LINES, INC.,
Intervenors.

Before:

LUMBARD, *Chief Judge,*

FRIENDLY and FEINBERG, *Circuit Judges.*

On Petitions of Intervenors for Rehearing

EXHIBIT D—Annexed to Foregoing Reply Brief

Opinion of the Court of Appeals on Petition for Rehearing

PER CURIAM:

In our decision of February 26, 1970, — F.2d —, slip opinions 1697, we directed the district court "to instruct the Maritime Administration not to redetermine the issue whether the AGAFBO carriers' concerted action in reducing their rates to an unreasonably low level and holding them there for eleven months was unjustly discriminatory or unfair to Sapphire." Shortly thereafter, the AGAFBO lines, which, although fully aware of this action, had been sedulously abstaining from participation, see 417 F.2d 972, 976 n. 4 (1969); — F.2d at —, sought leave to intervene for the purpose of seeking a rehearing on that portion of our decision. We granted such leave, received petitions and accompanying briefs, and then called upon counsel for the appellants and appellees to respond.[1]

The argument most strongly pressed by the intervenors is that they had no sufficient incentive and, indeed, no opportunity to appeal the adverse findings of the FMC, see — F.2d at —, slip opinions at 1705. The latter branch of the argument hangs mainly on the fact that the rates found by the FMC to give rise to a violation of § 15 of the Shipping Act had expired and therefore could no longer be disapproved under § 18(b)(5). But § 15 subjects offending lines to a penalty of $1000 per day of violation. Since the FMC's determination would be conclusive in a civil action

[1] We requested counsel for the appellees to obtain the views of the Federal Maritime Commission. The latter, taking no position with respect to other issues, has advised "that its sole concern here, in the context of its responsibilities under the Shipping Act, is to insure that the finality of its determinations is preserved and that its factual findings will not be litigated long after the statutorily prescribed time for judicial review has run and in proceedings to which it is a stranger." This was the precise object of our decision.

for penalties, it was therefore clearly appealable. See *Pacific Far East Lines, Inc.* v. *FMC*, 410 F.2d 257 (D.C. Cir. 1969). In view of the sharp tone of the FMC report and the even sharper one of the separate opinion of two members, the intervenors could hardly have taken lightly the threat of the Government's suing for a penalty; indeed, we are informed that five of them have recently settled their liability by paying $25,000 each. Moreover, while we relied mainly on this point, — F.2d at —, slip opinions at 1705, we did not at all mean to suggest that the AGAFBO lines should not have been aware of the possible effect of the FMC determination in a proceeding under § 810 of the Merchant Marine Act, of whose potentiality they were apprised very shortly after the FMC decision.

The Government makes the point that if appellants wished to have the Maritime Subsidy Board give conclusive effect to the FMC decision, the Board has a procedure enabling them to raise this matter in limine. They could have moved for a summary disposition of the issue by the Hearing Examiner, 46 C.F.R. 201.91, could have requested permission from him to appeal an adverse decision to the full Maritime Administration, 46 C.F.R. 201.93, and if that were granted and the appeal proved unsuccessful, could have sought further review by the Secretary of Commerce, 46 C.F.R. 202.1. Be all this as it may, we were faced with a statement by the district judge, implying that the FMC determination did not have binding effect, — F.2d at —, slip opinions at 1699-1700, and, after two and a half years, we see no point in launching appellants on the wearisome course the Government has plotted when we are clear that the legal issue must be decided in their favor. The short of the matter is that nothing advanced by the intervenors or the Government alters our conclusion that "it would be quite unseemly for the Maritime Administration

EXHIBIT D—Annexed to Foregoing Reply Brief

Opinion of the Court of Appeals on Petition for Rehearing

to conclude that its sister agency had been wrong in a fully litigated issue the decision of which Congress had confided to it." — F.2d at —, slip opinions at 1705.

Two minor points should be mentioned. Four intervenors, American President Lines, Ltd., Prudential Steamship Co., Inc., Prudential-Grace Lines, Inc., and Farrell Lines, Inc., urge that they were not competing with Sapphire, had no interest in the rates which the FMC condemned and never voted on these. We see no reason for the concern felt by these carriers. We directed only that the issue whether the reduction of the rates was unjustly discriminatory or unfair to Sapphire was not to be relied upon before the Maritime Administration; we said nothing about who was responsible for these and, by a *footnote 2,* emphasized that "Nothing we have said should be read as preventing the Maritime Administration from investigating the nature and extent of the individual carriers' participation in the illegal action . . ." On the other side, the Government is fearful lest "the tenor of the opinion and the rationale underlying it would appear to foreclose the Maritime Subsidy Board from investigating and concluding, contrary to a majority of the FMC, that a wider conspiracy existed." But there was no "majority" finding on the issue of a wider conspiracy, since the four participating members divided two to two. The issue therefore remains open.

The intervenors' petitions for rehearing are denied.

EXHIBIT E — Annexed to Foregoing Affidavit

CIB Vol. 77 April 6, 1973 Court Denies AIMS Motion to Dismiss AMA Complaint in Double Subsidy Case

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Secretary

Vol. 77—No. 67—April 6, 1973—Page 1

COURT DENIES A.I.M.S. MOTION TO DISMISS A.M.A. COMPLAINT IN "DOUBLE SUBSIDY" CASE

The U.S. District Court for the District of Columbia has denied a motion by the Liner Council of the American Institute of Merchant Shipping to dismiss a suit filed by the American Maritime Association against the Maritime Administration's Subsidy Board and the nation's subsidized steamship carriers over the issue relating to subsidy payments for the carriage of military and other preference cargoes.

In February of this year AIMS told the Court that the AMA complaint should be dismissed because the group, representing most of the nation's unsubsidized lines, failed to exhaust administrative remedies in its battle with the Subsidy Board. (See our Vol. 77, No. 36 of February 22, page 4 for coverage of the AIMS filing).

EXHIBIT E—Annexed to Foregoing Affidavit

CIB Vol. 77 April 6, 1973 Court Denies AIMS Motion to Dismiss AMA Complaint in Double Subsidy Case

AMA, in its motion for summary judgment (Civil Action No. 1576-72) had asked the Court to reverse MSB's decision denying a request by the unsubsidized representative that four rules be promulgated to require the subsidized lines to repay a proportionate share of their construction and operating subsidies whenever they carry military or other preference cargoes. This request is still pending before the court. (See February 9, Vol. 77, No. 28 for background).

AIMS had contended that AMA erred it going to the Court first and not the Secretary of Commerce for a review of the MSB decision.

In its order of April 4, the District Court ruled that the AMA actions were properly before the Court and ordered the defendant (Secretary of Commerce) and intervenor (AIMS) to reply to the AMA original motion within 30 days.

District Court Judge AUBREY E. ROBINSON NOTED:

"Upon consideration of the Motion of Intervening Defendant Liner Council, American Institute of Merchant Shipping, for Summary Judgment, and upon consideration of the entire record herein, it appearing to the Court that these actions are properly before the Court, 5 U.S.C. Section 704, *United States* v. *Consolidated Mines and Smelting Co., Ltd.*, 455 F.2d 432 (9th Cir. 1971), 28 U.S.C. Section 2201, et seq., now therefore it is this *4th* day of April, 1973.

"ORDERED, that said Motion be and hereby is denied, and it is

"FURTHER ORDERED that both Defendant and Intervening Defendant shall respond within thirty (30) days of date to plaintiffs' outstanding Motions for Summary Judgment."

EXHIBIT F — Annexed to Foregoing Reply Brief

Letter from James S. Dawson, Jr., to Michael J. McMorrow, Dated May 8, 1973

U.S. DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION
Washington, D.C. 20235

May 8, 1973

Michael J. McMorrow, Esquire
U.S. Department of Commerce
Maritime Administration
Washington, D.C. 20235

Re: Docket No. S-243—Investigation of Alleged Section 810 Violation

Dear Mr. McMorrow:

Your letter of April 17, 1973, seeking clarification of the intent of the concluding paragraph of the Opinion and Order of the Maritime Subsidy Board, dated April 16, 1973, is acknowledged. You inquired, in your capacity as Public Counsel in this proceeding, "whether the Board intended to leave unfinal its decision on liability until the dollar amounts of recovery from [only] some of the respondents is determined." Despite your letter and the passage of time no other party of record has raised the question, whether formally or informally.

Please be advised that it was the intent of the Board in issuing an "Opinion and Order the Maritime Subsidy Board" and in stating that upon issuance of a subsequent order "on final recoveries this decision will become final" that the Board intended to leave "unfinal" its decision on liability until the issuance of a final decision for purposes of Department Organization Order No. 10-8. As you appreciate, a final decision of the Board is governed by DOO 10-8 which concerns review and finality of actions of the Board.

Sincerely,

/s/ JAMES S. DAWSON, JR.
JAMES S. DAWSON, JR.
Secretary

cc: All Parties of record

EXHIBIT 3

Affidavit of Marshall P. Safir, Dated April 27, 1973

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 33389/90/91

MARSHALL P. SAFIR,

Appellant,

—against—

GIBSON-STANS, et al.,

Appellees.

State of New York
County of Kings ss.:

MARSHALL P. SAFIR, being duly sworn, deposes and says:

In accordance with the mandate of this Court in Docket No. 33389/90/91 decided Sept. 26, 1969 the Maritime Administration/Maritime Subsidy Board has finally made a finding of violation of Sec. 810, MMA 1936 against all the subsidized steamship lines who were members of the AGA FBO conference (Exhibit A).

The MA/MSB has found that appellants "allegations are true" and has also made a "considered" decision to recover what it calls subsidies paid in the past.

To the extent of the finding of violation and the decision to recover (as mandated by this panel of the Court) appellant is grateful. Appellant also gives thanks that after four years of agency "consideration" that he is alive to question and Judge Friendly, Judge Kaufman and Judge Waterman are still here to decide whether the MA/MSB

decision is on grounds consistent with the statute as interpreted in the opinion of this Court issued on Sept. 26, 1969.

In making this decision the MSB has stated (p. 60) that,

> "We have discretionary authority under the statute to determine whether and to what extent to recover ODS for past violations of Sec. 810 from Title VI contractors in order to implement the policies of the act."

To further these self bestowed powers the Board then proceeded to establish an irrelevant formula for the assessment of a fine which attempts to set the price for allowing subsidized carriers acting *in concert* to destroy an unsubsidized American ocean carrier.

In its decision and order, the Board is preoccupied with the mitigating effect of possible bad advice of counsel to the violators. Disenchantment with the advice of counsel seems to be a distinguishing characteristic of all parties in this case including appellant *Pro se* but it is "unseemly" for the Board itself to disregard the considered judgment of its own counsel the Solicitor General of the United States who in arguing before the Supreme Court for the prematurity of the grant of a petition for Certiorari in this case has stated (Exhibit *B* p. 9).

> "By contrast, the penalty created by Sec. 810 is inflexible as it bars all subsidy payments for at least the period of violation."

The Board has now found a willful violation of Sec. 810—or more realistically was collaterally estopped by this Court from finding otherwise.*[1] In order to avoid its

*[1] (432 F 2nd 137, 142 (1970) *Cert. denied* 400 U.S. 972).

mandated responsibility it proceeded arbitrarily and capriciously to enlarge its discretion beyond the interpretation of the Solicitor General and the clear wording of the Court in its Sept. 26, 1969 decision.

Whether the Solicitor General had knowledge of the decision by the MA/MSB known as Docket A-17 and listed as #6SSR57 (1965) (Exhibit C) this appellant does not know but he feels certain that if this Court knew of its existence it would not have included the footnote in its "Sequel" decision (Exhibit *B* p. 7). After the MSB established the victim's qualifications to the protection of Sec. 810 the entire investigation was an irrelevant re-litigation of the original FMC decision in Docket 65-13.

The decision in Docket A-17 should have bound the Administrative Law Judge and the Board to the conclusion that continuing as a party to and conforming to an agreement which is unjustly discriminatory or unfair to any other citizen of the United States is *no mere technicality* (see Exhibit C pp. 64, 65, 66).*[2] Instead the decision in Docket A-17 was ignored while the Board bled every last ounce of discretionary time allowed by the footnote to delay the inevitable decision.

Once the act is invoked the Board's discretionary authority ceases and *all* payments of ODS, as defined in the agreements between the MA and the carriers, made during the 11 month period and singled out by the carriers as the only form of subsidy they recognize as recoverable—must be recovered.

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*[2] Ironically the MA/MSB order in Docket A 17 was served in July 1965 during the height of the violation in this case. All the violators had fresh knowledge of their jeopardy but continued as parties and conformed.

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The recovery—of subsidy payments is ministerial and not subject to formula's based on any factors other than as defined under the ODS agreements between the government and the carriers.

By attempting to invoke sanctions against some carriers ("trade") while omitting sanctions against others ("non-trade") although it found all in violation, the Board acted contrary to the interpretation of the law by its own counsel the Solicitor General, contrary to its own precedent and caveat to *all* the carriers in Docket A-17 (#6S8R57) (1965) and in a manner *in*consistent wtih the statute as interpreted by this Court.

For purposes of simplification at the present time appellant prays that the Court consider only ODS as defined in the ODSA agreements with the carriers as subject to recovery under this motion. Other forms of subsidy both direct and indirect mentioned in the decision in S-243 should be subject to later review once the initial ODS amounts paid are recovered from the violators for the 11 month period.

To further simplify the issue for justiceability appellant defers for the present the question of the Board's failure to in any way promote the competitive interest of the victim or the question of appellant's rights under 31 USC 231-232 to participate in the recovery.

Respectfully submitted,

/s/ MARSHALL P. SAFIR Pro Se
MARSHALL P. SAFIR

ROBERT J. DANNENHOFFER
Notary Public, State of New York
No. 52-5916586
Qualified in Suffolk County
Commission Expires March 30, 1974

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Opinion and Order of the Maritime Subsidy Board, Dated April 16th, 1973

U.S. DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION
MARITIME SUBSIDY BOARD

Docket No. S-243

Investigation of Alleged Section 810 Violation

In the matter of the complaint of Sapphire Steamship Lines, Inc. re Alleged Violation by Atlantic and Gulf American Flag Berth Operators (AGAFBO) of Section 810 of the Merchant Marine Act, 1936, as amended.

Chairman, Robert J. Blackwell; Member, H. Clayton Cook, Jr.; Alternate Member, James S. Dawson, Jr.

Served Upon:

Marshall P. Safir, 41 Flatbush Avenue, Brooklyn, New York 11217 *pro se.*

James N. Jacobi, Esq., Kurrus & Jacobi, 2000 K Street, N. W., Washington, D. C. 20006 for American Export Lines, Inc.

J. Franklin Fort, Esq. and *Richard S. Salzman, Esq.,* Kominers, Fort, Schlefer & Boyer, 1401 K Street, N. W., Washington, D. C. 20005 for Lykes Bros. Steamship Co., Inc. and Moore-McCormack Lines, Incorporated.

John Williams, Esq., Kirlin, Campbell & Keating, 120 Broadway, New York, New York 10005 for United States Lines, Inc.

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Amy Scupi, Esq. and *Olga Boïkess, Esq.*, Galland, Kharasch, Calkins & Brown, 1054 31st Street, N. W., Washington, D. C. 20007 for Bloomfield Steamship Co.

Robert T. Basseches, Esq., Shea & Gardner, 734 Fifteenth Street, N. W., Washington, D. C. 20005 and *Daniel H. Margolis, Esq.*, and *Murray J. Belman, Esq.*, 21 Dupont Circle, N. W., Washington, D. C. 20036 for American President Lines, Ltd., Prudential-Grace Lines, Inc. and Prudential Steamship Company, Inc.

Verne W. Vance, Esq. and *Andrew J. McElaney, Jr., Esq.*, Foley, Hoag & Eliot, 10 Post Office Square, Boston, Massachusetts 02109 for Farrell Lines, Inc.

Michael J. McMorrow, Esq., Maritime Administration, Washington, D. C. 20235, as Public Counsel.

Docket No. S-243 is an investigative proceeding instituted by the Maritime Subsidy Board (Board) on October 24, 1969 to determine whether Section 810 of the Merchant Marine Act, 1936, as amended (Act),[1] had been violated by conduct of certain carrier members of the Atlantic and Gulf American Flag Berth Operators (AGAFBO) and the appropriate action that should be taken. Named as parties to the proceeding were petitioners Sapphire Steamship Company (Sapphire) and its individual owners, Marshall P. Safir and Arnold Weissberger, who along with others,[2] had petitioned

[1] 46 U.S.C. § 1227 (1970).

[2] These were two service organizations, Pioneer Overseas Services Corporation, a traffic management agency wholly owned by Mr. Safir, and Liberty-Pac International Corporation, a freight forwarder specializing in the overseas transportation of household goods wholly owned by Mr. Weissberger. They were extended the opportunity to file petition for leave to intervene in the proceeding but never made such filing. Of all the petitioners,

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the Board in December 1967 for, among other things, recovery of any subsidies paid to such members of AGAFBO and others based on alleged violations of Section 810. Also named as parties were steamship operators which had been both members of AGAFBO and under operating-differential subsidy (ODS) contracts during all or a part of the period March 29, 1965 to March 1, 1966. Of these, the following had competed with Sapphire in the U.S. Atlantic and Gulf to U.K./Bordeaux/Hamburg trade (U.K./B-H range): American Export Isbrandtsen Lines, Inc. (presently American Export Lines, Inc. (AEL)), Bloomfield Steamship Company (ceased being party to an ODS contract after December 31, 1965), Lykes Bros. Steamship Co., Inc. (Lykes), Moore-McCormack Lines, Incorporated (Mormac), and United States Lines, Inc. (USL). Those subsidized members which had not competed with Sapphire in such trade were: American President Lines, Ltd. (APL), Farrell Lines Incorporated (Farrell), Grace Line, Inc. (presently Prudential-Grace Lines, Inc. (Grace)), and Prudential Lines, Inc. (presently Prudential Steamship Company, Inc. (Prudential)). The first group are referred to collectively as the "trade respondents" while the latter collectively are referred to as "non-trade respondents."

The conduct questioned as violating Section 810 concerned the respondents acting in concert to reduce selected military cargo rates in the U.K./B-H range and holding them there during eleven months (March 29, 1965 to March 1, 1966) allegedly for the purpose of driving Sapphire from the U.K./B-H range. The Federal Maritime Commission

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only Mr. Safir made an appearance in the proceeding representing himself pro se and claiming to represent Sapphire. Sapphire was a U.S. non-subsidized steamship company owned equally by Mr. Safir and Mr. Weissberger which was declared bankrupt in May 1967. The court appointed trustee for Sapphire expressly disclaimed an interest in this proceeding.

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(FMC) held in Docket 65-13 in 1967 that such rate reductions violated the Shipping Act, 1916, as amended:

> "AGAFBO, by reducing its rates to an admittedly noncompensatory and unreasonable level in an attempt unfairly to compete with Sapphire, violated section 15 by knowingly setting rates which were contrary to section 18(b)(5) and which were detrimental to commerce and contrary to the public interest." [3]

Petitioners obtained a judicial order from the U.S. Court of Appeals for the Second Circuit as formulated by the U.S. District Court for the Eastern District of New York on remand that the above FMC finding was *res judicata* and under the doctrine of collateral estoppel constituted a finding of violation of Section 810 but for certain peripheral elements of that statute.[4] The court order directed that the Board proceed with determining whether a violation had occurred, whether to recover subsidies during the period of violation, and, if so, how much and from whom. The Board in an order served December 19, 1970 directed the Chief Hearing Examiner Paul N. Pfeiffer, now Chief Administrative Law Judge, to proceed in such manner.

A public hearing was conducted from March to September 1971, principally in Washington, D.C. and a full record

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[3] Docket No. 65-13, *Rates on Government Cargoes*, 11 F.M.C. 263, 287 (1967).

[4] *Safir* v. *Gibson*, 432 F.2d 137, 143(2d Cir.), *cert. denied*, 400 U.S. 942 (1970); *Order on Mandate of the U.S. Court of Appeals for the Second Circuit*, Docket 680643 (E.D.N.Y. 1970). The courts held that the FMC finding binding on Marad constituted a finding that such AGAFBO conduct respecting the rate reductions was "unjustly discriminatory or unfair" to Sapphire within the meaning of Section 810 of the Act.

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compiled. Chief Judge Pfeiffer served a Recommended Decision on April 24, 1972. He recommended that the trade respondents but not the non-trade respondents, had violated Section 810. After considering mitigating circumstances, he found that Lykes was the initiator of the violation with AEL, Mormac and USL somewhat reluctant followers, and Bloomfield's participation significantly less. He recommended as sanctions against the trade respondents that about $6,690,000 in ODS be recovered, that about $158,000 in unpaid construction-differential subsidy (CDS) on certain purchased ships be refunded, that the Department of Agriculture be notified of the opportunity to recover about $2,880,000 premium rates paid on carriage of cargoes under Public Law 480, that about $14,300 in advantageous charter hire to USL be refunded, that the privilege of Lykes depositing tax deferred earnings in ship replacement reserves be withheld for 337 days, and that the proceeding be referred to the Justice Department with regard to Lykes for such civil or criminal action as Justice may decide to pursue.

All parties except Public Counsel filed exceptions to the Recommended Decision and all parties filed subsequent answers. With the permission of the Board, certain trade respondents filed a further response to Public Counsel's answer. On October 10, 1972, the Board heard oral argument from all parties.

We have considered the record, the Recommended Decision, and the arguments of all parties. We find that all subsidized members of AGAFBO violated Section 810 but that recovery of operating subsidies is appropriate only from those who were in direct competition with Sapphire (the trade respondents). The issues for discussion concern the

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violation of Section 810, the Board's discretion to mitigate recoveries for past violations under Section 810, the mitigation factors advanced by respondents, and the appropriate recoveries giving regard to factors of mitigation.

DISCUSSION

I. *Violation of Section 810*

Section 810 of the Act provides in part as follows:

> "It shall be unlawful for any contractor receiving an operating-differential subsidy under Title VI or for any charterer of vessels under Title VII of this Act to continue as a party to or to conform to any agreement with another carrier by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports."

In compliance with the court order finding the previously discussed 1967 FMC finding as binding on Marad, the Board has established that "the AGAFBO carriers' concerted action in reducing their rates to an unreasonably low level and holding them there for eleven months [from March 29, 1965 to March 1, 1966] was unjustly discriminatory or unfair to Sapphire." [5]

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[5] Order Denying Petition for Ruling, Docket No. S-243, 11 S.R.R. 1144, 1148 (MSB 1970); *Safir* v. *Gibson*, 431 F.2d 137, 143 (2d Cir.), *cert. denied*, 400 U.S. 942 (1970); *Order on Mandate of the U.S. Court of Appeals for the Second Circuit*, Docket 680643 (E.D.N.Y. 1970).

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The precise condemned AGAFBO rates have not heretofore been expressly identified by the FMC in Docket 65-13 or by the courts in finding the FMC rate findings binding on Marad. The FMC decision referred to the March 29, 1965 AGAFBO rate reductions on the military household goods under Through Government Bill of Lading (TGBL) and on military household goods shipped free in and out (FIO—without loading or discharge costs to the ship) and to AGAFBO's notification to the Military Sea Transportation Service (MSTS) that these rates were made as a strictly temporary competitive measure and were not fair, reasonable, or compensatory. The FMC decision also stated that AGAFBO also "filed competitive rates on other goods in reaction to Sapphire competition."[6] The record in Docket 65-13 indicates that the Secretary of AGAFBO testified that all other AGAFBO rates filed in the U.K./B-H range "on a temporary basis to meet the Sapphire rates" were believed to be non-compensatory and that AGAFBO had informed MSTS in February 1966 that the AGAFBO temporary reduced rates to the U.K./B-H range "due to expire as of March 1, [1966]" were not fair, reasonable or compensatory.[7] The AGAFBO temporary military rate reductions in the U.K./B-H range, which expired on March 1, 1966, included those for TGBL-HHG, FIO-HHG, empty conex containers, general cargo, and vehicles of certain weight. We find that these are the rate reductions which occurred during the period March 29, 1965 to March 1966, which the FMC condemned as violating the Shipping Act, 1916, as amended, and which the court ordered not to be relitigated as to whether they were unjustly discriminatory or unfair to Sapphire under Section 810 of the Act.

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[6] 11 F.M.C. at 274-275.

[7] FMC Docket 65-13, Tr. 62-63 (S-243 Exhibit R-93); FMC Docket 65-13, Exhibit 485 (S-243 Exhibit PC-151).

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As for the other elements necessary for a violation of Section 810, no exception was taken to the Chief Judge's finding that Sapphire was a U.S. citizen exclusively employing U.S. registered vessels and operating on established U.S. Trade Routes 5-7-8-9 and 11 during the eleven month period and that all respondents were ODS contractors during this period with Bloomfield's contract expiring on December 31, 1965. We adopt those findings. Exceptions were taken to his findings that Sapphire was a common carrier, that Sapphire operated in the U.S. Gulf on Trade Route 21 and that Section 810 extends to AGAFBO subsidized members who did not directly compete with Sapphire and who allegedly did not engage in any of the overt actions of reducing the pertinent AGAFBO rates in the U.K./B-H range. Further issues are raised as to whether Section 810 applies to rate cutting and not just exclusion from a steamship conference, and whether Section 810 can only apply prospectively.

A. *Sapphire's Common Carrier Status and Operation on T.R. 21*

All parties agree that the test of a "common carrier by water" applicable to Section 310 is as defined by the Supreme Court in *Propeller Niagara* v. *Cordes*, 62 U.S. 7, 22 (1858):

> "A common carrier is one who undertakes for hire to transport the goods of those who may choose to employ him from place to place. He is, in general, bound to take the goods of all who offer, unless his complement for the trip is full, or the goods be of such a kind as to be liable to extraordinary danger, or such as he is unaccustomed to convey."[8]

[8] The definition was cited in *Isbrandtsen Co., Inc.* v. *American Export Lines, Inc.*, 4 F.M.B. 772, 782 (1956), as controlling on the meaning of "common carrier by water" under Section 810 of the Act.

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The Chief Judge found that Sapphire had common carrier status from U.S. Atlantic and Gulf ports to ports of the U.K./B-H range during the period of violation, relying on its holding out and its carriage of some commercial cargo over a substantial period of time and a large quantity of (TGBL-HHG) cargoes and privately-owned vehicles (POV) for the military, which he considered as properly commercial cargoes since they moved through normal commercial channels. Sapphire's limited Gulf service was found to be a common carrier service despite limited activity since it was "entirely conceivable" that absent the Lykes and Bloomfield reduced rates in concert with the other AGAFBO U.K./B-H range members, Sapphire "could have developed a viable operation to and from the Gulf." Public Counsel supports the Sapphire common carrier findings of the Chief Judge.

Trade respondents argue that Sapphire operated a military express service and not a common carrier service because it contradicted its holding out of a commercial service to the public by making it difficult for agents to book commercial cargoes, by placing an embargo on all commercial cargoes during a summer 1965 strike against other carriers, and by rejecting all but the most lucrative and convenient parcels of commercial cargoes offered by the shipping public and instead carrying almost exclusively military cargoes and negligible commercial cargoes. They emphasized that in its entire existence Sapphire never carried a cumulative total of a single shipload of commercial cargo "solicited at openly advertised tariffs." They also contend that TGBL-HHG and POV cargoes are military and not commercial cargoes because of the Government's interest therein and because all authorities recognize them as military cargoes. The Gulf trade respondents argue

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especially that Sapphire never established itself as a Gulf common carrier because it had minimal vessel contact with but one port in the Gulf, *de minimis* shipments of non-military cargoes in the Gulf, and in fact had rejected cargoes at ports other than New Orleans. The Gulf trade respondents further contend that even if Sapphire is considered a Gulf common carrier, that service could not have commenced until April 9, 1965, when Sapphire's tariff for its Gulf service became effective, and that the service ended in May 1965 with the termination of any Sapphire Gulf commercial coverage followed by cessation of advertisement of Gulf service in August 1965 and any Gulf operation in January 1966. Bloomfield adds that Section 810 in promoting the competitive interest of a victim requires the establishment of a competitive relationship between the subsidized carrier and the victim and that there was never any actual competition between it and Sapphire.

It is undisputed that Sapphire held itself out as a common carrier at least in the U.S. Atlantic/U.K./B-H range over the entire period of violation. It advertised its voyages, published by filing with the FMC its commercial and military cargo tariff rates, and solicited commercial and military cargoes by appointing agents in many of the U.S. and European ports it serviced. Sapphire did have a practice of requiring its agents not to book commercial cargoes on Sapphire vessels without first getting clearance from the line's New York headquarters. The record shows, however, that such practice did not result in the rejection of any offered commercial cargo unless it was offered at less than tariff rates or deviated from an advertised sailing itinerary

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or involved a special call.[9] Sapphire also interrupted its solicitation efforts for two months during the U.S. maritime strike lasting from June to September 1965. Although the strike did not affect Sapphire vessels and competitor lines not struck were carrying commercial cargoes, it appeared the Sapphire management was attempting to protect against collateral union action. In any event the interlude in solicitation for a limited period does not indicate any desire by Sapphire not to hold itself out on a permanent basis as a common carrier by water.

It is also undisputed that Sapphire carried at least $262,957.55 of commercial cargoes during the period of alleged violation,[10] that on all voyages on which commercial

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[9] Trade respondents cite only two instances of Sapphire rejecting offered commercial cargoes. The first instance involved a Dutch shipper offering tonnage of bagged grass seed on a regular basis to New York, Philadelphia, Norfolk, Baltimore and New Orleans if Sapphire could offer regular sailings and a better freight rate than the conference lines (Exhibit R-10). This is not a specific offering but a general one with unresolved questions of acceptable freight rate, numbers of calls to be made in any one sailing, understanding of "regular sailings," etc. Rejection of this offer on the present record does not rebut a common carrier finding. The second instance involved an offer of 700 tons of aluminum ingots from London to Baltimore and Philadelphia (Exhibit R-16). However, London was not an advertised call and the offer was rejected.

[10] During the period of alleged violation Sapphire received total revenues of $5,203,875.12. Commercial cargo was carried on 13 of 34 voyages up to and including the 28th voyage. This commercial cargo consisted of soybeans, lumber and general cargoes (Exhibit R-1 Rev.). The bulk soybean cargoes were carried according to normal commercial common carrier practice. Sapphire also carried commercial cargoes subsequent to the violation from May through September 1966.

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cargoes were carried multiple shippers were served, that it served, a regular and defined route, that it issued customary bills of lading for commercial carriage thereby assuming responsibility for safe carriage and that it was responsible for loading and unloading commercial cargoes. Section 810 does not require that the victim have a comparable common carrier service to the violators. It is well known that unsubsidized operators have immense problems in carrying purely commercial cargoes on a profitable basis in the U.S. foreign commerce. Since Sapphire held itself out to carry commercial cargoes and regularly carried some such cargoes over a substantial period of time over a set trade route, we are persuaded that Sapphire met the common carrier test as between U.S. Atlantic ports and ports in the U.K./B-H range during the period of alleged violation.[11] This conclusion is consistent with that of the FMC, which in Docket 65-13 found that Sapphire "operated a liner service" on the U.K./B-H range,[12] and with MSTS, which found the new company Sapphire was "a common carrier, with scheduled sailings on a designated trade route or routes, and with sufficient ships to support the schedule."[13]

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[11] See, *e.g.*, Hutchinson, *Carriers* §48 (3d ed. 1906) (common carrier if hold out as such, he is engaged in business of carrying goods for others, transportation is for hire and action against him lies for refusal without sufficient reason to carry proffered goods); *Activities, Tariff Filing Practices and Carrier Status of Containerships, Inc.*, 9 F.M.C. 56, 61-65 (1965).

[12] 11 F.M.C. 263, 265 (1967).

[13] Exhibit PC-158 (March 31, 1965); Tr. K-76. This finding was conditioned on Sapphire's booking at least one outbound and one homebound sailing without MSTS-booked cargo (Tr. K-77). Therefore, MSTS did not begin booking cargo with Sapphire until its second sailing from Baltimore on or about April 16, 1965.

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We are not persuaded that TGBL-HHG and POV cargoes carried by Sapphire for the military can be considered as commercial cargoes for purposes of common carrier status. These cargoes are privately-owned and private shippers (not individual owners) contract with the ocean carriers for shipment. More importantly, however, these cargoes are shipped on a government bill of lading at government expense pursuant to a freight rate negotiated with the government and overall transportation arrangements are made by the government for its convenience. Further, we think it clear that a court would find thees government cargoes subject to statutory preference for U.S.-flag for their ocean shipment as apparently even Mr. Safir recognized in testimony before the FMC.[14]

MSTS has explained the policy with respect to Sapphire as follows:

> "MSTS policy is not to induce the establishment of berth service from or to any particular port. Accordingly, cargo is not booked to or for any port until Sapphire has made one prior scheduled call at such port without inducement of military cargo." (Exhibit R-77-letter from MSTS to Office of Assistant Secretary of Defense, Installation & Logistics dated April 26, 1965.)

[14] Before the FMC, Mr. Safir and his attorney made the following remarks:

> "Q. Well how do you justify that [the fact that Sapphire military TGBL-HHG rate was lower than its in-house rate] in view of the requirement of the 1904 Act that you charged the Government not more than you were charging commercial shippers? "A. [Mr. Safir] The question of whether the military household goods was a commercial ship[ment] or not is a debatable point.
>
> "Mr. Klausner: Mr. Hansen [Secretary of AGA-FBO], in fact, testified that it was a military movement." (Exhibit R-2, pp. 2322)

Further, prior to Sapphire's entrance in the market these cargoes

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We also find that Sapphire maintained an operation on Trade Route 21 (Gulf/U.K.-B-H) as a common carrier during a portion of the period of alleged violation. In so finding we do not reach the issue of whether Section 810 requires the victim to be a common carrier by water wherever it operates. For the Gulf/U.K./B-H range Sapphire filed with the FMC a commercial tariff effective April 9, 1965, hired soliciting agents, and advertised sailings. Through January 1966 Sapphire loaded cargo at New Orleans three times and called at New Orleans twice inbound, incident to taking delivery or making redelivery of chartered vessels. On each voyage it earned substantial revenues, total commercial freight revenues representing about 30% of total revenues for all five voyages.[15] There can scarcely be any serious question that Sapphire operated on the trade route within the meaning of Section 810 since the statute requires merely operation, not substantial operation. Also, since Sapphire did hold out a commercial Gulf service and carried commercial cargoes on Trade Route 21 over a substantial period, it had common carrier status for such service. The

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were includable in the MSTS military cargo allocation system (Tr. 1227-1228, K8-10).

In *United States Lines, Co.* v. *United States*, 223 F. Supp. 838, 844 (SDNY), *aff'd* 324 F.2d 97 (2d Cir. 1963), the court held that POV cargoes shipped on private ocean carriers at Government expense under Government bill of lading came under 10 U.S.C. 2631. Public Counsel's distinction that the case involved a shipping order issued directly by the military to the carrier is simply not a material distinction in view of the overwhelming incident of military control and contact with the cargoes.

[15] According to trade respondent Lykes, total freight revenues of Sapphire for its Gulf operation amounted to $271,487 during its period of operation and the record shows that Sapphire carried $81,761.63 of commercial freight revenues of that total (Exhibit R-1, Analyses 3, 5 (revised), 11, 23, 28).

exact time frame of this status is not germane other than it was within, but less than, the alleged period of violation. The measure of liability of the Gulf trade respondents Bloomfield and Lykes is not governed by the period and extent of Sapphire's Gulf common carrier operation. It is governed by the duration and coverage of the military rate reductions first effected by AGAFBO on March 29, 1965. Lykes voted for such reductions; Bloomfield was eligible to vote on such reductions and in a couple of instances did vote for such reductions; and both respondents conformed to the filed AGAFBO tariffs' condemned rate reductions.

Finally, on the issue of common carrier status, Bloomfield seemingly maintains that Section 810 requires some competition between Sapphire and Bloomfield to establish a violation. While Section 810 may be designed "to promote the competitive interest of a victim by authorizing recovery of subsidies," [16] the Section does not require a competitive relationship between the violator and the victim to establish a violation. Congress intended to protect potential competition as vigorously as it intended ot protect existing competition.

B. *Section 810 and Non-Trade Respondents*

The Chief Judge found that the trade respondent members of AGAFBO who actively participated in the conspiracy against Sapphire violated Section 810, but that the non-trade respondents who had not overtly participated did not violate Section 810. He distinguished a Board decision in Docket No. A-17, *American President Lines, Ltd., Japan/Saigon Freight Conference,* 6 S.R.R. 57 (1965), which held that the mere continued non-voting membership in an inter-

[16] *Safir* v. *Gibson,* 417 F.2d 972 (2d Cir. 1969).

national steamship conference which excluded other U.S.-flag operators violated Section 810. The Chief Judge stated that in the situation in Docket A-17 continued membership inured benefits to the conference member U.S. carrier but that there were no benefits to the non-trade respondents in AGAFBO's rate reductions.

The non-trade respondents emphasize the recommended finding that they had not violated Section 810, and Public Counsel emphasizes that no violations were found as to the limited subject of this proceeding; i.e., the condemned AGAFBO rate reductions. Mr. Safir argues that the decision in Docket No. A-17, in finding an 810 violation for being a party to or conforming to a discriminatory agreement, forecloses the Board from making any distinctions between the violators.

We recognize that the Second Circuit expressly noted that it "said nothing about who was responsible for these" condemned rate actions [17] and that the matter is open for our decision. We are persuaded that the non-trade respondents as members of AGAFBO, and therefore parties to the AGAFBO rate tariffs, have violated Section 810.

The AGAFBO agreement, FMC Agreement No. 8086, provided in part as follows:

> "Meetings shall be called by the Secretary from time to time by mailing a notice to each party containing a docket of the matters to be considered . . . Except as otherwise provided for, all actions within the scope of this agreement shall be upon a vote of 75% of

[17] *Safir* v. *Gibson*, 432 F.2d 137, 146 (1970). See also Order Denying Petition for Ruling, 11 S.R.R. 1144, 146 (1970)

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those parties present and voting thereon at a meeting. However, as to any matter having application only to a specific region, such as the Bordeaux-Hamburg range, the Persian Gulf, the Far East, etc. only those parties having a shipping contract or rate agreement with MSTS covering such area or regularly serving a non-contract area shall be entitled to vote thereon. Any of the parties entitled to vote on such matter shall have the right to have the matter submitted to a full membership vote with action thereon to be taken by 85% of those parties present and voting thereon. *All actions taken pursuant to this agreement shall be binding on all parties hereto.*" (Emphasis added.)

With regard to the AGAFBO rates in the U.K./B-H range the option of area members to require an area rate action to the full membership was never exercised. None of the non-trade respondents voted on any of the condemned AGAFBO rate reductions. It is unclear as to the extent, if any, of their participation in any discussions on the merits of such rate reductions.[18] Once the vote was taken

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[18] For instance, the initial condemned rate reduction stemmed from an AGAFBO meeting of March 9, 1965. The minutes for that meeting reported:

> "The question was raised as to whether only the Bordeaux-Hamburg, U.K. lines should vote since the matter involved rates for those areas or whether all member lines should vote since there was a question of policy involved. It was agreed that since all members had participated fully in the discussion and agreed on the basic policy involved that only the Bordeaux-Hamburg lines would vote."

Subsidized operators shown present at the meeting were AEL, APL, Lykes, Mermac, Prudential and USL. The non-trade re-

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by the U.K./B-H members of AGAFBO it became binding on all members of AGAFBO with a potential fine by the organization of $10,000 for violating such action should the non-trade respondent commence a service in the range and not abide by the AGAFBO rate.

The organization AGAFBO and not the individual members filed the condemned rate tariffs with the FMC although the carriers servicing the trade, for which the rates were applicable, were identified. The FMC found that the "AGAFBO rates", reduced to an admittedly non-compensatory and unreasonable level in an attempt to unfairly compete with Sapphire, violated Section 18(b)(5) of the 1916 Shipping Act and that "AGAFBO" by reducing such rates violated Section 15 of the 1916 Shipping Act. From such findings the Second Circuit found that "AGAFBO" carriers' concerted action in reducing their rates to an unreasonably low level and holding them there for eleven months was unjustly discriminatory or unfair to Sapphire." Although it is clear the entity AGAFBO was addressed by the FMC and the courts, the precise nature of the unlawful act committed by AGAFBO under Section 810 was not specified.

Section 810 decrees as unlawful a subsidized operator acting in concert (1) "to continue as a party to or to conform to any agreement," or (ii) "to engage in any practice . . . which is unjustly discriminatory or unfair. . . ." We

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spondents maintain the "policy involved" was whether the non-U.K./B-H AGAFBO members should vote. We merely note that such explanation requires a peculiar reading of the minutes, as "The question was raised as to whether only the Bordeaux-Hamburg, U.K. lines should vote . . . since there was a question of whether only they should vote."

See also Exhibits PC-108, 110, 112.

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find that the Section 810 prohibited activity is (1) continuing as a party to or conforming to the AGAFBO military TGBL-HHG cargo rate tariff effective March 29, 1965, and similar rate tariff amendments on the U.K./B-H range admitted to be non-compensatory and unreasonable, or (2) engaging in the "practice" of filing such tariff amendments. Non-trade respondents as well as trade respondents were members of AGAFBO, bound by all its actions,[19] and, therefore, a party to the AGAFBO rate reduction tariffs and amendments which were unjustly discriminatory and unfair. They therefore have technically violated Section 810.

The decision in Docket A-17, finding that an American-flag operator continuing as a non-voting member of a conference excluding other American-flag operators would violate Section 810, cannot be fairly distinguished. It was noted in that decision that Section 810 "makes no mention of voting, nor does it divide membership into types and classes." We add that Section 810 also fails to distinguish between conferences governing one trade area and conferences governing multiple trade areas as AGAFBO did. While the non-trade respondents received no direct benefits from the condemned rate reductions since they did not operate in the U.K./B-H range, it is clear that indirectly most of them saw the matter possibly spreading in terms of

[19] It is recognized that Mr. Hansen, the Secretary of AGAFBO, testified that the provisions of the AGAFBO agreement that "All actions taken pursuant to this agreement shall be binding on all parties" hereto had never been interpreted (Tr. 686-687). However, we consider the provision clearly encompasses binding all AGAFBO parties to the votes, and implementing actions, on military cargo rates in specific regions. Such provisions, of course, would control an AGAFBO member who operated outside of the region on which the rate was established but who subsequently desired to operate in such region.

rate reductions and competition to their own areas [20] and achieved benefits in that such rate reductions did not spread to other areas. It is not an adequate rebuttal by either non-trade respondents or trade respondents that a finding of violation of Section 810 is precluded because such respondents would have had to resign to avoid violating Section 810, thereby breaking up the AGAFBO conference which allegedly the Government desired to continue. American subsidized operators cannot be parties to unfair and unjustly discriminatory agreements against another U.S.-flag operator covered by the provisions of Section 810 without violating that Section.

C. *Section 810, Rate Activity and Prospective Application*

Trade respondents argue that the Second Circuit in the *Safir* v. *Gibson* decisions did not foreclose a finding that Section 810 does not apply to rate activity. The Chief Judge, supported by Public Counsel, found that Section 810 applied not only to exclusion of an American-flag carrier from conference membership but also to conference predatory rate practices against an American-flag carrier. It is sufficient to observe that the Second Circuit stated that "the fixing of unjustly discriminatory or unfair rates aimed at an American-flag carrier pursuant to a conference agreement would constitute a 'practice' [unlawful under Section 810]."[21] Further, the premise of the court's directing the Board "not to redetermine the issue whether the AGAFBO carriers' concerted action in reducing their rates to an unreasonably low level and holding them for eleven months was unjustly

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[20] Tr. 979-81, 986, 993, (APL); Tr. 1025 1028 (Prudential); Tr. 1125 (Grace).

[21] *Safir* v. *Gibson*, 432 F.2d 137, 142 (1970), *cert. denied*, 400 U.S. 972 (1970).

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discriminatory or unfair to Sapphire" was that Section 810 applies to rate activity.

In a similar manner the trade respondents' contention that the Second Circuit has not foreclosed finding that Section 810 operates prospectively only is without any basis. The Second Circuit stated "that § 810 was designed to promote the competitive interest of a victim by authorizing the recovery of subsidies improperly paid in the past. . . ." [22] Further, we would not be under mandate to reach a decision on recovery for past violations under Section 810 if the Second Circuit had not found Section 810 applies to recoveries for such past violations.

In summary, we find that all respondents were ODS contractors from March 29, 1965 to March 1, 1966, except Bloomfield which was an ODS contractor until December 31, 1965, and that all respondents in concert were parties to or engaged in practices unjustly discriminatory or unfair to Sapphire during such time period. We also find that Sapphire was a U.S. citizen operating as a common carrier by water and exclusively employing U.S. registered ships on Trade Routes 5-7-8-9 and 11 (Atlantic/U.K./B-H trade) during such time period and on Trade Route 21 (Gulf/U.K./B-H trade) within that time period. Further, we find that Section 810 provides for recovery of payments and subsidies for past violations and applies to rate activity as well as to exclusion of a U.S. carrier from a conference. Therefore, we find that all respondents violated Section 810 from March 29, 1965 to March 1, 1966, except that respondent Bloomfield's violation extended only to and in-

[22] *Safir* v. *Gibson*, 417 F.2d 972, 978, (1969). See discussion of this finding *infra* on consideration of Mr. Safir's arguments that recoveries for violations of Section 810 are made to the victim.

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cluding December 31, 1965, and further that on the same basis all respondents breached their ODS agreements with the Government which set forth pertinent provisions of Section 810.

II. *Board Discretion in Recovering Past Payments.*

The Chief Judge found that the Second Circuit, the District Court and the Board have all recognized the Board's discretion on "whether to seek recovery of subsidies paid during the violation and, if so, how much and from whom." Apparently, only Mr. Safir excepts to such finding. Mr. Safir argues that it is irrelevant to investigate the nature and extent of the individual carrier's participation in the illegal action because the decision in Docket A-17, found that continued membership in a conference excluding American-flag carriers violates Section 810.

The Second Circuit did not make any definite finding regarding any discretion in connection with recovery of payments for past violations. At most the court found that while there may be "some discretion in connection with the recovery of past subsidies as distinguished from payments to current violators, the discretion is not unlimited." [23] We agree with the Chief Judge that Congress

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[23] *Ibid.* It is also noteworthy that the Second Circuit, in response to concerns of non-trade respondents, expressly stated:

> "Nothing we have said should be read as preventing the Maritime Administration from investigating the nature and extent of the individual carrier's participation in the illegal action, should it find these matters relevant to its ultimate decision on whether to seek recovery of subsidies paid during the violation and, if so, how much and from whom."

Safir v. *Gibson*, "432 F.2d 137, 145 n.2, 146 (2d Cir.), *cert denied*, 400 U.S. 942 (1970).

intended discretion to be exercised in imposing any such recovery. Congress had two objectives in permitting, under Section 810, recovery of payments or subsidies made in the past: primarily, removal of the added burden that U.S. payments to the violators imposed on the competitive opportunities of the victim and, secondarily, imposing a certain deterrent effect against future violations.[24] However, conflicting statutory purposes are presented. On the one hand, the Act requires promotion of the U.S. merchant marine through subsidies and other means, and, on the other hand, Section 810 requires withdrawal of those subsidies when they are used to the detriment of a U.S. operator within our merchant marine. Certainly, Congress intended both purposes of the Act to be carried out. Therefore, it is apparent that Congress intended considerable discretion in weighing the recoveries to be effected for past discontinued violations so as not to infringe seriously upon the promotional purpose of the Act. Further since Section 810 is at least partially penal in character in requiring retroactive recovery of subsidy for past violations, mitigating circumstances can be considered in determining the sanctions to be imposed.[25] The decision in Docket A-17 considered only the liability under Section 810 for ongoing violations. It did not consider recoveries for past violations or the discretion, if any, of the amounts to be recovered with respect to each individual violator. Accordingly, we consider respondents' arguments for mitigation of recoveries.

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[24] See discussion of the Congressional intent in Section 810 as to recoveries for past violations at page 56-60 *infra.*

[25] *E.g., United States* v. *H.M. Prince Textiles, Inc.*, 262 F. Supp. 383, 388-89 (SDNY 1966).

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III. *Mitigation Factors*

Mitigation factors pertain both to non-trade respondents and trade respondents. The former have the same arguments for mitigation as for a finding of their not having violated the statute. The latter advance several mitigation factors which they claim require that no amounts be recovered from any trade respondent.

A. *Non-trade Respondents*

Although the non-trade respondents technically violated Section 810, we are not persuaded that any sanctions are warranted. As stated hereinabove, the non-trade respondents did not, and could not under the AGAFBO agreement as implemented, vote on any of the illegal rate reductions. None of these respondents had any competitive service with Sapphire during the violation and therefore carried no cargo at the reduced AGAFBO rates. Their only connection with the condemned rate actions was as a technical party to the AGAFBO condemned rate tariffs due to their membership in AGAFBO.

Such technical connection, while conclusive of their liability for violating Section 810, provides no basis under the circumstances for imposing any sanctions for such violation.

B. *Trade Respondents*

Trade respondents argue that some seven factors warrant mitigation of all recoveries for violating Section 810: (i) the military (Department of Defense—DOD, including Military Sea Transportation Service—MSTS) pressured AGAFBO to reduce rates to Sapphire's level; (ii) the Government is estopped by its actions from penalizing respondents for making those reductions; (iii) the reductions were

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made on advice of counsel; (iv) the reductions did not injure Sapphire; (v) AGAFBO's van line policy towards associated companies of Sapphire was justified; (vi) the reductions involved no predatory intent toward Sapphire; and (vii) individual respondents had special circumstances regarding the rate reductions meriting mitigation.

(1) *Military Pressure for Lower AGAFBO Rates*

The Chief Judge found that the military exerted pressure to get lower AGAFBO rates, but that the military also believed that AGAFBO's original rates were too high for the services rendered and that AGAFBO members rates for commercial cargoes were disparately lower than for similar cargoes shipped under military auspices. He also found that the military made no effort to obtain reductions below compensatory rate levels or to obtain reductions only to match the Sapphire rates but rather that the military sought rate reductions across the board.

Trade respondents argue "that in actual fact MSTS did not care one whit whether the rates offered by the AGAFBO carriers were compensatory or not" and that MSTS and DOD did seek AGAFBO rate reductions on a discriminatory basis to the U.K./B-H range. They particularly argue that the military sought lower AGAFBO rates by means of reducing for Sapphire certain requirements usually imposed upon carriers of military cargoes. Public Counsel argues that the emphasis by the trade respondents on other causes for the rate reductions, especially the withdrawal of Waterman Steamship Corporation (Waterman) from AGAFBO and the protection of van line customers, serves to negate the contention that the rates were dropped because of military pressure.

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The pertinent issue presented by the plea of trade respondents for mitigation because of military pressure is whether they made the reductions in response to such pressure for lower rates or for other reasons. We find that at best this pressure was a relatively minor consideration in the trade respondents' rate reductions.

The background of the military pressure cited by trade respondents involved compliance with the McCumber Amendment of 1904, 10 U.S.C. § 2631, which required a U.S.-flag ocean carrier to charge the Government no more for carriage of goods than it charged commercially. There had been severe official criticism, at least since 1963, that the military was being charged more in the North Atlantic trade than was being charged commercial shippers for the same cargoes.[26] The military itself had undertaken studies which supported this criticism.[27] The situation on the North Atlantic, to which many of these criticisms were particularly directed, apparently was precipitated by a commercial rate war which drove down the commercial rates while the military cargo rates under military shipping contracts were not similarly reduced. In the course of coping with this problem the military was presented with a proposal by Liberty-Pac International Corp. (Liberty-

[26] On March 23, 1963, a federal district court issued a decision highly critical of the failure of MSTS officials to enforce the McCumber Amendment with respect to POV rates for the military in 1957-1960 in the North Atlantic trade, *United States Lines Co.* v. *United States*, 223 F. Supp. 838 (SDNY 1963). *aff'd*, 324 F.2d 87 (2d Cir. 1964). On December 29, 1964, the Joint Economic Committee of Congress chaired by Senator Douglas issued a report also critical of MSTS enforcement of the McCumber Amendment. Further, DOD and GAO had expressed similar criticism (Exhibit R-49).

[27] *E.g.*, Exhibit R-49, attachment G.

Pac).[28] In 1964 Liberty-Pac proposed to the Assistant Secretary of Defense for Installations and Logistics that military household goods be moved by TGBL in steel containers at a $3 per hundred weight rate reduction to Germany, provided, however, that Liberty-Pac be released from the MSTS allocation system[29] and that it be given the right to charter ships if berth operations (AGAFBO members) refused to negotiate reduced ocean freight rates for such cargo. The relevant circumstances of the military pressures cited by the trade respondents, which concern the interreaction of this problem of rate comparability and consideration of the Liberty-Pac proposal, are as follows:

1. On December 5, 1964, DOD indicated it found the terms of the Liberty-Pac proposal "attractive" but it insisted that household goods of DOD personnel had to move on U.S.-flag vessels in berth service and that the household goods moving industry be given the same opportunity. About two days later MSTS enclosed pertinent correspondence on the Liberty-Pac proposal to AGAFBO and solicited its comments. AGAFBO responded flatly that it had

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[28] The relationship of Liberty-Pac to Mr. Safir and Sapphire is explained in note 2 *supra*. Liberty-Pac was a household goods van line carrier. Such carriers contracted with the military for the combined land and sea movement of TGBL-HHG, incorporating in the combined rates quoted to the military and ocean freight rate. Prior to acceptance of the Liberty-Pac proposal, the only available U.S. ocean carriers were members of AGAFBO who negotiated the TGBL-HHG rate directly with MSTS.

[29] Under the military "allocation system", MSTS allotted military cargoes among ocean carriers serving a route on the basis of the number of sailings each carrier offered on the particular route. Thus, a carrier offering four of twenty sailings on a route would be eligible for 20 percent of the military cargo carried on that route. Prior to acceptance of the Liberty-Pac proposal TGBL-HHG were included in the allocation system.

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no present intention of modifying its rates for TGBL-HHG and requested that DOD require of anyone making such a proposal to evidence its financial ability to perform. A few days later a DOD official called AGAFBO asking what steps it might take to compete with Liberty-Pac should that corporation be given authority by DOD to operate chartered ships in common carrier berth service. Evidently, AGAFBO refused to change its position, and on December 29, 1964, DOD accepted the entire Liberty-Pac proposal with the understanding that all carriers in the household goods moving industry would be given the opportunity to make similar proposals.

2. According to the Secretary of AGAFBO, a key official at DOD on January 21, 1965, expressed surprise that AGAFBO had not taken steps to make its rates competitive with those of Liberty-Pac. On that date the same official issued a statement that any offer embodying similar rate reductions to that of Liberty-Pac's would be accepted (steel containers were not mentioned), but MSTS did not require exemption of household goods from the allocation system if another carrier proposed competitive rates and desired to remain within the allocation system. Further, it was stated that the scope of such exemption was limited to service to German ports since Liberty-Pac's offer was so limited. Trade respondents claim this statement increased pressure on them to match the Liberty-Pac rate reductions.

3. On February 2-3, 1965, MSTS, in meeting with AGAFBO, sought an immediate goal of rate reductions across the board. MSTS hinted of certain alternatives which were understood to include use of Liberty-Pac and refusal to certify the reasonableness of the AGAFBO rates

to the Renegotiation Board.[30] At the meeting there was also a study presented of a comparison of commercial and military rates on the U.K./B-H range which showed in some instances that commercial rates were lower than rates for "comparable" military cargo.

4. On February 3, 1965, Liberty-Pac expanded its proposal to include service to the United Kingdom and France at a total reduction in rate of $5 per hundred weight. Apparently, thereafter Liberty-Pac realized or learned that the military had taken *all* household goods out of the allocation system and had dropped the requirement for steel containers. Mr. Safir testified that these steps by the military had a severe adverse effect upon Liberty-Pac's proposal and that it had to cancel the steel container purchase contract. Hence, Liberty-Pac's reduction became more dependent on lower ocean freight rates.[31] The three vessels that had been chartered were retained, however, and a

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[30] The Renegotiation Board under the Renegotiation Act, 50 U.S.C. App. § 1121 *et seq.*, guarded against contractors reaping excess profits from government contracts. Prior to 1965, MSTS had rather routinely certified to the Board that no basis was known to suspect that AGAFBO carriers were enjoying excess profits since MSTS had negotiated such rates with AGAFBO. Based upon lower commercial rate patterns in 1964 and 1965, MSTS began to suspect the AGAFBO military rates were too high and that GBL shipments were a favorable alternative to FIO shipments (Tr. K-37-40; Exhibit R-55).

[31] It was estimated that originally Liberty-Pac's proposed $5 per hundred weight reduction was derived from about $2 attributable to efficiency of steel containers and the traffic pattern that would be developed, about $1 from more favorable steamship rates due to use of steel containers and about $2 from economics of volume business generated from service to the U.K., France and Germany (Tr. 1249-51; Exhibit R-42).

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steamship company (the Sapphire Steamship Company) was formed on February 12, 1965, to operate them.

5. On February 11, 1965, certain van line customers sought rate reductions from AGAFBO so that they could compete with Liberty-Pac. They asserted that Liberty-Pac's rate was predicated upon its ability to obtain reduced water transportation costs. AGAFBO was not immediately moved by its customers' requests.

6. Meanwhile on February 9, 1965, MSTS instructed its field offices to prepare to withdraw certain cargoes from carriage under shipping contracts where substantial shipments by GBL (as opposed to FIO) would be cheaper. This step was implemented on March 2, 1965. Also, on February 9, MSTS instructed its field offices to accumulate cargoes for shipments on the U.K./B-H range under the volume discount provisions of shipping contracts. MSTS considered it was being overcharged for substantial volumes on the North Atlantic route. On February 15, MSTS requested of AGAFBO cost data necessary for a report to the Renegotiation Board. On February 19, MSTS requested AGAFBO's best offer for a downward revision in the general military cargo rate for the U.K./B-H range.

7. On March 2, 4, and 9, 1965, AGAFBO members deliberated over whether to reduce its TGBL-HHG and FIO-HHG rates and on the last date voted to reduce the rates from 81¢ to 52.5¢ per cubic feet for TGBL-HHG and from 58.5¢ to 23¢ per cubic foot for FIO-HHG on the Atlantic U.K./B-H range on a 30 day temporary basis to revert to previous levels if not extended. The TGBL-HHG reduced rate was calculated to be equivalent to the Liberty-Pac proposed rate reduction and was made just prior to

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the March 19 deadline for van line inland carriers to meet the Liberty-Pac proposal. Two days later Sapphire announced a 45.5¢ per cubic foot rate for TGBL-HHG in the Atlantic-U.K./B-H range (as compared to the AGAFBO's voted-upon-rate of 52.5¢). At a special meeting on March 16, 1965, the AGAFBO carriers operating on that range voted on the same basis as before to meet the 45.5¢ rate. Such AGAFBO rate was filed with the FMC.

8. On March 29, 1965, AGAFBO members explained the rate reductions to MSTS, citing in detail the circumstances of the Liberty-Pac proposal and concluding:

> "As a matter of record we do not believe that either rate [Sapphire's or AGAFBO's] is fair, reasonable or compensatory and the action is taken in the interests of both the inland carriers and ocean carriers strictly as a temporary competitive action to give time for a realistic determination as to the competition which we must face and consideration of a proper action for the future.
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> * * * * *
>
> "As a final statement for the record we wish to repeat verbal statements made in discussions on this matter that at this time instead of a rate reduction there should logically be a rate increase to compensate for the increased cargo handling costs occasioned by the recently concluded I.L.A. agreements." [32]

9. After this statement and prior to May 18, 1965, MSTS made use of all the favorable Sapphire dates which included a 40¢ per cubic foot rate for general military cargo as compared to the AGAFBO rate at 54.5¢ per cubic

[32] Exhibit PC-4.

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foot for such cargo. AGAFBO used the time to challenge with MSTS whether Sapphire had complied with MSTS regulations. MSTS replied that Sapphire had complied.[33]

10. Also during this period trade respondents point out that on March 30, 1965, MSTS wrote the Renegotiation Board refusing to extend to AGAFBO an exemption under the Renegotiation Act, and that on May 13, 1965, MSTS met with AGAFBO and indicated the military desired to negotiate a 13.6% decrease in North Atlantic general cargo rates.[34]

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[33] Trade respondents also argue that MSTS went to unusual efforts to support the Sapphire operation in order to force down the AGAFBO rates. However, the record only shows that Sapphire was treated the same as any TGBL carrier would have been at that time. For instance, MSTS permitted Sapphire to qualify for financial fitness and as a berth operator after one voyage from a port, but only as a TGBL carrier; it retained its traditional requirement that three qualifying voyages were necessary for Sapphire to be eligible to receive a shipping contract (Exhibit PC-19). Further, the military accorded Sapphire a preference on the carriage of military cargo when its rates were lower or were quoted for a longer time (6 mos. vs. 30 days) in the same manner as AGAFBO carriers were treated when they offered rate advantages to the military (Exhibit PC-11).

[34] Exhibit R-58. In this connection it should be noted that MSTS did not pressure AGAFBO to reduce its rates to noncompensatory levels. MSTS' policy was that it would not knowingly accept rates which were not compensatory (Exhibit R-65(2)). While AGAFBO asserted its reduced rates were unfair, unreasonable and noncompensatory, it submitted no proof of this claim. MSTS had made some review of the Sapphire rates (Tr. K-55-58, 63-64) and on that basis considered them reasonable. It did not, however, undertake a full scale analysis of the compensatory nature of the Sapphire rates because it lacked sufficient data (Tr. K-55, 58) and the issue of what constitutes compensatory

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11. At an AGAFBO meeting on May 18, 1965, Waterman's representative was asked to leave the meeting in view of Waterman's announced decision to withdraw from AGAFBO effective May 23 and to establish rates equivalent to Sapphire's rates. The U.K./B-H range members then voted, on a temporary basis, to match the Sapphire general military cargo rates.[35]

These events show that AGAFBO consistently rebuffed, for at least two year, all attempts by the military to induce rate reductions and that when AGAFBO reduced its rates the reductions initially were not across the board, as the military sought, but strictly limited on a temporary basis to the TGBL-HHG cargoes which Sapphire principally planned to carry. AGAFBO even hastily convened a meeting to match Sapphire's rates exactly. In explanation of the initial rate reductions AGAFBO did not indicate to the military that the action was in acquiescence to the military's position; instead it cited other grounds. When AGAFBO reduced its general cargo rates it was to match Sapphire's rates, which were below the level of reductions sought by the military. Testimony of shipping executives of trade respondents confirm that military pressure was a minor reason for the trade reductions and that other

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rates had always been highly controversial and the ultimate responsibility of the FMC (Tr. K-69). It had, however, undertaken rate comparability studies which suggested the original AGAFBO rates were considerably more costly than commercial rates, see note 26 *supra*.

[35] Trade respondents also cite other indicia of military intentions gleaned from documents discovered in this proceeding. The relevant point in time, though, is the period of violation. At that time AGAFBO could only have responded to the communication it actually received from the military. Hence, the recently discovered indicia was not referred to herein.

factors were more critical.[36] Finally, if the trade respondents were bowing to unrelenting pressure from the military for rate reductions, it is a curious mystery why AGAFBO members let its condemned reduced rates revert to former higher levels in the very teeth of such pressure.

(2) *Argument that Government is Estopped*

The Chief Judge gave no credence to the trade respondents' argument that MarAd is estopped from enforcing Section 810 because the violators were importuned by the military to lower military freight rates. He found that

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[36] An executive for AEL testified that AEL voted for rate reductions on and after May 18, 1965, in order to keep AGAFBO together, in view of the pending, and then actual, resignation of Waterman (Tr. 1416-17, 1422-23, 1435). An executive for Bloomfield testified that it agreed to the rate reductions because the majority of U.K./B-H range AGAFBO members were for the reductions (Tr. 1327-28, 1364-65). An executive for Lykes testified that Lykes voted for the reductions to keep AGAFBO intact and to avoid facing Waterman at its reduced rates (Tr. 840-41, 900-01). An executive for Mormac testified that Mormac voted for the rate reduction to forestall Waterman's resignation from AGAFBO and to continue to carry the cargo (Tr. 1089-90, 1100-01, 1105-06). An executive of USL explained its reasons for voting were to protect established van line customers, to continue to carry the cargo, to avoid the loss of competitive posture to Waterman, to keep others from following Waterman, and to retain benefits of AGAFBO such as favorable credit arrangements (Tr. 914-15, 918-19, 955-56, 964). An executive for American Union Transport, an unsubsidized operator which attended most of these meetings, even testified, in response to an inquiry whether the military exerted pressure for the U.K./B-H range AGAFBO members to reduce their rates to those of Liberty-Pac, that: "It was not my recollection that the Department exerted any pressure of any kind." He did testify that the military was "plain and simple interested in lower rates." (Tr. 1160-61).

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Section 810 require MarAd to insure that subsidies paid to meet foreign competition are not improperly used to destroy U.S.-flag carriers.

Trade respondents argue that the Government was responsible for the AGAFBO decision to reduce its rates and having received the benefits of that reduction is legally estopped from recovering subsidies. They claim that whenever the doctrine of estoppel is involved it overrides a Government obligation, such as under Section 810. They urge that if the principle of estoppel is not accepted by the Board, the Board takes into account as mitigation the benefits the Government did receive from the rate reductions, allegedly "in the neighborhood of $14 million."

As discussed hereinabove, the Government was not primarily or essentially responsible for the AGAFBO decision to reduce its rates. The trade respondents reduced their rate primarily for other reasons. Therefore, we need not and do not make any finding on the issue whether estoppel could be invoked in this instance if the Government had been responsible for the AGAFBO condemned rate reductions. Further, we cannot take into account, as mitigation, the alleged benefits the Government received from the condemned rate reductions because it has not been established that but for those rate reductions the United States would not have had Sapphire as another commercial operator offering competitive compensatory rates at levels returning equal or greater benefits to the Government than claimed by trade respondents.

(3) *Advice of Counsel*

The Chief Judge carefully considered the trade respondents' argument that the AGAFBO rate reductions were

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made in good faith on the advice of counsel, that the advice was entirely reasonable, and that such circumstances alone required no imposition of any recoveries. The Chief Judge found that AGAFBO members had consulted the organization's attorney on the rate reductions, but also that the AGAFBO carriers should have known that their concerted actions, taken with predatory intent, were illegal. He found that there were legal alternatives available that would have enabled fair competition with Sapphire. He also found that the attorney's advice was premised on an unestablished fact, that the AGAFBO reduced costs reflected out-of-pocket costs, and that such advice was erroneous. Further, the Chief Judge found that AGAFBO members used the attorney as a "scapegoat" rather than having actually relied on him.

Trade respondents dispute every one of the Chief Judge's findings. Generally they argue that he failed to distinguish between a mitigating circumstance and a legal defense and that the attorney's advice was reasonably relied upon by AGAFBO. They add the charge that the Board's refusal to permit the attorney to testify because of the invoked attorney-client privilege is prejudicial error to the extent it prevents the Board from taking into account trade respondents' good faith in acting on advice of counsel.

We are persuaded that trade respondents have presented circumstances on this subject which warrant some, but not total, mitigation of recoveries under Section 810 for their rate reductions. The record shows that prior to the initial rate reductions on March 9, 1965, AGAFBO members had directed that its attorney be consulted and that said attorney thereafter added the statement in the agreed-upon-motion of March 9, 1965, that AGAFBO did "not feel the

rate is fair, reasonable or compensatory." It also appears from the statements of counsel for trade respondents that the actual advice was that as long as the reduced rates covered out-of-pocket costs, the reductions were not unlawful.[37] The circumstances of the conveyance of this advice to AGAFBO members and the manner in which they relied upon such advice was not developed on the record by the trade respondents despite an opportunity for further testimony for that purpose, suggested by the Chief Judge and the Board.

Testimony of executives of most of the trade respondents indicate that advice of counsel was of background importance in making the condemned rate reductions.[38] Only

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[37] In our view it is immaterial for present purposes whether the attorney's advice was correct because the thrust of the argument is that there was legal advice and it was relied upon, even if erroneous. The FMC and Second Circuit have found the advice was wrong with respect to violation of the 1916 Shipping Act and Section 810 of the 1936 Act regarding unfair and discriminatory action to U.S.-flag common carriers by water. We are under court order not to relitigate that issue and we consider the order just as conclusive against a collateral attack as a direct attack.

[38] An executive for Lykes testified that "some counsel" tacked on the language that the AGAFBO rate reduction voted on March 9, 1965, was not fair, reasonable or compensatory (Tr. 837). An executive of USL testified that his company had voted to refer the matter of whether the Liberty-Pac/Sapphire household goods rate might be enjoined to AGAFBO's attorney (Tr. 913). An executive of Mormac testified that AGAFBO was getting legal advice "with respect to all these matters." (Tr. 1101). An executive of Bloomfield testified his company had not consulted legal counsel before joining in the condemned rate reductions and that it had not relied on counsel in taking such actions (Tr. 1361, 1363).

an executive for AEL testified that his company relied on the AGAFBO attorney's advice in taking such actions.[39] However, this testimony is somewhat puzzling. The same executive testified that AGAFBO's attorney was responsible for the phrase that AGAFBO did "not feel the rate is fair, reasonable or compensatory" in the AGAFBO March 9, 1965 rate reduction but AEL's present position is that the rate reductions were compensatory.

In summary, it appears that most of the trade respondents considered that the rate reductions were being made with the approval of AGAFBO's attorney but it is not apparent that such advice was critical to their decision to reduce the rates.

(4) *Injury to Sapphire*

The FMC in Docket 65-13 found that AGAFBO rate reductions "did have a disastrous effect on Sapphire."[40] The Chief Judge found the trade respondents' arguments irrelevant that such finding was erroneous, and that Sapphire was not so injured. In the Chief Judge's view, Section 810 proscribes unfair and unjustly discriminatory action taken with the intent to drive a U.S.-flag competitor from a trade. He did not consider that a violation of 810 required the attempt to be successful. Public Counsel supports that position and adds that the FMC conclusion that the rate reductions adversely affected Sapphire cannot be inquired into, by order of the court and the Board.

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[39] Tr. 1419, 1436.

[40] 11 F.M.C. at 283. The FMC elaborated that "AGAFBO, by means of its reduced rates, did in fact deprive Sapphire of the nucleus cargo which was indispensable to Sapphire's profitable operations." *Ibid.*

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Trade respondents reiterate their arguments that the rate reductions in no way injured Sapphire and that the FMC finding of disastrous effect on Sapphire was not supported by evidence. They add that Mr. Safir, in testifying before the FMC in December 1965 of the success of Sapphire, admitted that AGAFBO had not injured Sapphire.

Aside from the problem of attacking findings by the FMC, we fail to perceive the relevance in this proceeding, even as a factor of mitigation, of the extent of injury caused to Sapphire by AGAFBO. This proceeding is not concerned with the injury to Sapphire (as is the provision for treble damage under a separate part of Section 810). Rather, this proceeding concerns policies regarding recoveries from respondents for actions intending injury to Sapphire and affecting the welfare of the U. S. merchant marine. As for these policies, it makes no difference whether the proscribed action caused injury or whether it was unsuccessful, and recoveries should not be reduced according to the degree of succes or failure of the intended injury.

(5) *AGAFBO's Van Line Policy*

The Chief Judge found that AGAFBO's van line policy "was so pointed that the assertion it was taken in good faith to protect AGAFBO van line customers strains credibility." He cited AGAFBO actions in singling out Liberty-Pac and its affiliated companies, including Pioneer Overseas Service Corporation (Pioneer),[41] in applying stringent credit terms, in filing lawsuits against such companies for moneys owed to members of AGAFBO, and in protests to

[41] Pioneer was wholly owned by Mr. Safir and performed many services of household goods movers. See note 2 *supra*.

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the military about such companies. He found these actions showed predatory intent and bad faith. His findings were limited to the trade respondents since evidence on AGAFBO's van line policy was not admitted as to non-trade respondents, apparently because the position of the latter was that they had committed no violation inasmuch as they had not voted for the condemned rate reductions.

Mr. Safir excepts to absolving the non-trade respondents from any liability for their actions regarding the Liberty-Pac/Pioneer/Sapphire group. However, he acknowledged at oral argument before the Board that there was no evidence of record proving non-trade respondents were involved in a conspiracy broader than the condemned rate reductions because the Chief Judge had excluded such evidence as not in issue. The trade respondents argue that AGAFBO's van line credit policy towards the Pioneer group was not capricious or discriminatory but rather based on eminently reasonable grounds, namely, that the charges in questions were long overdue and legitimately owed and that the sanctions taken (new credit arrangements, lawsuits, protests to the Government) were lawful actions.

We are herein concerned with mitigation arguments relating to making certain condemned rate reductions and hence the relevance of the foregoing line of argument is whether trade respondents made the condemned rate reductions in order to protect their van line customers and, if so, whether such action was taken in good faith or in bad faith. The record supports the finding that a key reason for the AGAFBO condemned rate reductions in March 1965 was the desire to keep its members' van line customers competitive with Liberty-Pac, thus enabling AGAFBO to continue to carry the military household goods.

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As previously discussed, DOD and MSTS indicated in accepting the Liberty-Pac proposal that other household goods carriers (namely van line customers of AGAFBO) would be given the same opportunity. Such carriers were notified and did seek rate reductions from AGAFBO in order to compete with Liberty-Pac. The military ultimately gave the competing carriers until March 19, 1965, to match the Liberty-Pac proposal. AGAFBO characterized the dilemma it felt that Liberty-Pac posed as follows:

> ". . . there were basically only two possible approaches. The first was to stand firm on the existing rate in which case inland carriers would almost be forced to give their business to Sapphire which on the type of shuttle type operation they apparently contemplate might make it possible during the volume period to perform. Alternatively if they did not give their business to Sapphire and did not reduce their rate, their share of the business would go to Liberty-Pac or the other carriers who reduced their rates and went along with Sapphire. The second was to proceed with competitive action to reduce rates on a temporary basis to a level which would permit the other inland carriers to continue in competition with Liberty-Pac." [42]

AGAFBO resolved the "dilemma" on March 9, 1965, by unanimously agreeing to match what was thought to be Sapphire's ocean freight rate on TGBL-HHG on a 30-day basis, to revert to the former level if not extended. The minutes of the meeting indicate that a letter was to be sent to MSTS giving notice of the reduction "with full

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[42] Minutes of AGAFBO meeting, March 4, 1965, Exhibit PC-14, Tr. 955.

documentation that the rate is filed purely as a competitive action to protect the interests of all the inland carriers and AGAFBO members who have carried his TGBL cargo since the inception of this movement and clearly stating that we do not feel the rate is fair, reasonable or compensatory." [43] Such a letter was sent to MSTS on March 29, 1965, conveying notice of the rate reduction voted on March 9 and further reduced on March 16, 1965. All the condemned rate reductions, while in effect, were on a temporary 30 to 60-day basis, subject to reversion to the former level if not extended.

In seeking to "protect" their van line customers by voting for the condemned rate reductions in March 1965 it appears fairly certain that the trade respondents were actually protecting themselves. Under the AGAFBO analysis, if the trade respondents failed to reduce their TGBL-HHG rates, their van line customers would go bankrupt or Liberty-Pac would get all the business. In either event trade respondents would not carry the TGBL-HHG and their van line customers would be in a worse position to pay off existing obligations to trade respondents. Whether or not trade respondents acted in good faith in protecting their own competitive interests presents the basic question of the overriding motivation of trade respondents in making the condemned rate reductions. Trade respondents' van line credit policy, even if unduly discriminatory against Liberty-Pac, which we do not decide, has not been shown to be tied to such respondents' rate reductions.

(6) *Trade Respondents' Motivation for Rate Reductions*

Trade respondents deny any predatory intent against Sapphire in making the rate reductions. They claim they

[43] Exhibit PC-5.

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were motivated by a combination of pressures already discussed and also by Waterman's action of withdrawing from AGAFBO and then matching Sapphire's rates. They do not deny a "highly natural" concern over their own competitive position, but they argue that they reluctantly met the Sapphire rates under the pressures cited. They add that if AGAFBO members really desired to destroy Sapphire, instead of meeting Sapphire's rates on a temporary 30- or 60-day basis, they would have done it on a 6-month basis to eliminate the preference Sapphire enjoyed with the military because of its rate filings over the longer period.

The Chief Judge found no support for an attitude of reluctance to meet the Sapphire rates by the trade respondents. He found that AGAFBO was concerned with the possible ripple effect upon military rates in other areas where Sapphire did not operate and that the evidence established a predatory intent by AGAFBO's concerted action to restrain U.S.-flag competition.

We have previously considered all the factors advanced by trade respondents for their alleged good faith effort to meet the Sapphire competition except for two; i.e., the concern over AGAFBO's own competitive position and the actions of Waterman. We are persuaded that for the time period from at least early May 1965 until March 1966, the action of Waterman in relationship to AGAFBO was a significant factor in the continued rate reductions. When certain AGAFBO members voted the initial rate reductions on March 9 and 16 and April 7, 1965, Waterman was a member and voted for the reductions. Thereafter, Waterman decided to withdraw from AGAFBO to fully compete with Sapphire, presumably since they were heavily dependent on military source cargoes and had carried sub-

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stantial quantities of such cargoes. Waterman filed immediately to meet Sapphire's rate levels effective May 18, 1965. Lykes thereupon formally made the statement in the form of a motion at an AGAFBO meeting on or about May 12, 1965, that it would resign in order to be competitive in the Gulf if AGAFBO did not meet Sapphire and Waterman rates. Most of the other trade respondents testified that this threat of further disembodiment of AGAFBO caused them to assent to continued rate reductions.[44] When Waterman rejoined AGAFBO in March 1966 the AGAFBO rate reductions reverted to former levels.

On the other hand, trade respondents fail to mention that the FMC in Docket 65-13 found, as the Chief Judge found, that the rate reductions were a predatory device:

> "We consider now AGAFBO's ratemaking activities in reaction to Sapphire. AGAFBO reduced its rates to admittedly unreasonable levels with the sole purpose of mitigating any advantage to Sapphire. These rates were used as a *predatory device* to destroy competition and, as found above, were so unreasonably low as to be detrimental to the commerce of the United States contrary to section 18(b)(5)" (Emphasis added.)
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> * * * * *
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> "AGAFBO's rates were contrary to the public interest because they were *predatory in nature* and in derogation of an important aspect of the public interest, the policy to foster competition to the extent compatible with the regulatory purposes of the Act." 11 FMC 263 (1967) (Emphasis added.)

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[44] Tr. 918-19 (USL); Tr. 1100-01, 1105-06 (Mormac); Tr. 1417, 1422-23, 1426 (AEL); see Tr. 681-82, 773-14.

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These findings are a matter of record and have significance in this case.

We therefore find that, along with other motives asserted by trade respondents, which we have found to have had some bearing on their decision, such respondents sought to protect their competitive position by making rate reductions which were predatory in nature. Thus, the initial rate reductions were effectuated immediately prior to commencement of Sapphire's intended TGBL-HHG operations, the first such U.S.-flag competition AGAFBO encountered. The rate reductions exactly matched or in one instance was lower than Sapphire's rates, and AGAFBO's U.K./B-H range members even reconvened on March 16, 1965, to lower the rate reductions further so as to have equivalent rates with Sapphire. The rate reductions were on a temporary 30- or 60-day basis and were to revert to former levels. As already stated, the rate reductions were admitted to be not fair, reasonable or compensatory. Certain intra-line correspondence flatly indicated an intent to drive Sapphire out of business.[45] Finally, the degree to which AGAFBO watched the developing Liberty-Pac/Sapphire situation,[46] the legal action by trade respond-

[45] See note 51 *infra* and accompanying test discussing an intra-Lykes memorandum dated June 18, 1965. The notes of an unsubsidized operator, American Union Transport, which attended the March 2, 1965 AGAFBO meetings are also pertinent and stated: "Next the question of Liberty-Pac was dealt with. It boiled down to the method of how to stop Liberty-Pac from starting their new service." (Exhibit NT-15). Testimony indicated the notes referred to AGAFBO's desire "to try and delay or detain the opening of that service until they could clarify some legal or technical questions." (Tr. 1156.)

[46] AGAFBO held 21 meetings during the period January 12, 1965 to February 24, 1966, during which the Liberty-Pac pro-

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ents regarding the Liberty-Pac/Sapphire operation,[47] the concern over van line credit policies to the Liberty-Pac/Pioneer group during this period,[48] and the efforts to

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posal and/or Sapphire operation and/or rates were considered. The AGAFBO carriers also made use of certain committees to watch the situation. On January 7, 1965, AGAFBO carriers agreed to notify the President's Committee (a committee of presidents of the U.K./B-H range members of AGAFBO) of the Liberty-Pac situation and "to request they consider appropriate action with all interested Government agencies to protect the interests of the American Flag Berth Operator." (Exhibit PC-78). On April 5, AGAFBO carriers agreed to formation of a committee "for the purpose of keeping all interested parties informed as to developments on both the Sapphire and Project Blond situation." (Exhibit PC-7). Representatives of AEL, Lykes, Waterman and States Marine Liner volunteered to serve on the committee.

[47] On February 24, 1965, AGAFBO filed with the FMC a petition for investigation of the Liberty-Pac/Sapphire rates (Exhibit S-39). On March 2, 1965, the AGAFBO carriers requested "the Secretary . . . . to explore with Counsel the possibility of any legal action having merit which would result in obtaining an injunction or otherwise prevent the utilization of the unreasonable low rate quoted by Liberty-Pac until FMC had acted on the petition." (Exhibit PC-3.) AGAFBO did not pursue the injunction suit. On March 4, the AGAFBO carriers agreed to have filed at the FMC a petition for rejection of the Sapphire tariff as violating the Shipping Act, 1916, as amended (Exhibit PC-14). The petition was filed on March 9, 1965 (Exhibit S-70).

[48] On February 15, 1965, AGAFBO carriers noted Liberty-Pac's proposal to the military, the intended services of Sapphire and Pioneer, the highly speculative nature of the new enterprise, and the indebtedness of the participants to member lines and agreed to notify the Pioneer group "that unless all amounts due member lines [prior to November 16, 1964] were paid within seven days from date of telegraphic notice, the Secretary should then immediately request MSTS to request . . . [DOD] to take agreed action to insure collection of such accounts or suspend

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have the military suspend or withdraw its approval of Sapphire,[49] all support a finding that Sapphire's operation was of overriding concern in any AGAFBO action on the U.K./B-H range.

(7) *Individual Circumstances of Each Trade Respondent*

Each of the trade respondents cite individual circumstances which they assert warrant mitigation of any recoveries from them to be imposed for the condemned rate reductions. Most of these circumstances are a repetition of general mitigation factors so that the following discussion is limited to any new matter. Generally, the individual circumstances demonstrate that there were signi-

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the carriers' tender." All accounts delinquent after November 16, 1964, were to be placed on a cash basis (Exhibit PC-6). The military replied that AGAFBO's proposed action only against the Pioneer group and not all indebted carriers was discriminatory and the military would not act on that basis (Exhibits S-49, 50). On April 1, 1965, the AGAFBO carriers, after learning of Sapphire's soliciting business, voted to continue requiring compliance with their filed credit terms (Exhibit PC-15). On April 13, 1965, the AGAFBO carriers agreed to initiate court action against all van line members of Pioneer who had balances still outstanding with member lines (Exhibit PC-8). On April 30, 1965, AGAFBO carriers agreed to propose "that the van lines who no longer utilize Pioneer Overseas be given the regular credit period subsequent to the date of separation." (Exhibit PC-9).

[49] On April 2, 1965, AGAFBO sent MSTS a telegram charging a violation of both the Wilson-Weeks Agreement of 1954 and DOD policy requirements for a three-month period of berth service and financial qualifications in MSTS' use of Sapphire (Exhibit PC-12). The military rebuffed the charges (Exhibit PC-19), so AGAFBO carriers on April 7, 1965, agreed to send MSTS a further telegram stating Sapphire had not met MSTS' requirements for carriage of military cargo (Exhibit PC-12).

ficant individual differences in the extent and motive for participation in the rate reductions.

(i) *Lykes*—The Chief Judge found that Lykes took the lead "in the unlawful conspiracy to drive the Sapphire competition" from both the Atlantic and Gulf U.K./B-H range trades with full predatory intent to injure Sapphire. He found no circumstances mitigating full enforcement of Section 810 as to Lykes. He cited the facts that Lykes was the moving party to reduce the military TGBL-HHG rate on March 9, 1965, that on April 30, 1965, Lykes attempted unsuccessfully to get AGAFBO to meet all of Sapphire's military rates on the U.K./B-H range, and that on May 12, 1965, Lykes threatened to withdraw unless AGAFBO met the Sapphire and Waterman rates. In particular, as evidence of Lykes' motivation, he cited an intra-Lykes memorandum dated June 18, 1965, by W. J. Amoss, Jr., Chief Traffic Officer, which included the statement that Lykes was "the leader" in "the fight" . . . to prevent Sapphire from getting more than his share of MSTS' cargo" and that in time Lykes would "whip the situation down to where Sapphire only gets a share, and this is the same as saying he will have to go out of business." Public Counsel supports the Chief Judge's findings.

Lykes objects to the Chief Judge's "gross discrimination." It argues that it acted out of necessity to meet its major competitor Waterman. ("If Lykes was to retain a share of the military cargo, the Waterman competition left it no choice but to meet Waterman's rates irrespective of the activities of Sapphire.")[50] Lykes claims that there is no evidence that it was especially avid in its goal and argues that the fact of making a motion creates no greater

[50] Supplemental Brief and Exceptions on Behalf of Lykes Bros. Steamship Co., Inc. at 6.

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blame than voting on the motion. It argues that the June 18th letter had nothing to do with rate reductions, adopted a month before, but rather the preference Sapphire enjoyed with the military which the military subsequently acknowledged was "of questioned validity and equity." It pleads the rate reductions were the only choice for Lykes and other AGAFBO members because they could not resign, as the conference, which benefitted both the operators and the Government, would fall apart. Finally, it contends AGAFBO had no obligation not to compete with Sapphire and Liberty-Pac, which hoped to achieve a monopoly of TGBL carriage on the U.K./B-H range, provided it did not compete unfairly by undercutting Sapphire's rates which was not done.

There is certainly no individual circumstances involving Lykes that warrant any further mitigation than permitted from the general arguments already considered. Lykes offered the first motion to reduce AGAFBO military household goods rates to match those of Sapphire, and it persuaded other AGAFBO carriers to acquiese in its motion for reducing the rates on general military cargo by threatening to follow Waterman's action of resignation from the conference. It attended all AGAFBO meetings discussed herein and apparently voted for every proposed continuation of the condemned rate reductions. Its leadership and its purpose to have Sapphire "go out of business" are stated in the contemporaneous June 18th memorandum.[51]

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[51] "As you know, the fight is running hot and heavy to prevent Sapphire from getting more than his share of MSTS' cargo. We have been the leader in this although latterly joined by Waterman who exceeded our zeal somewhat by resigning from AGAFBO.

"It has been our position that we should meet Sapphire head-on and promptly and force him to live with the same conditions

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Lykes' present assertion that it would not have resigned from AGAFBO because of the benefit of the conference to the Government and the operators, is inconsistent with its threat of resignation in May 1965.

(ii) *AEL*—The Chief Judge found that AEL's initial participation was reluctant, but that it did eventually concur in the rate reductions. He found the evidence unclear on whether the reduced rates at which AEL carried military TGBL-HHG cargo were in fact compensatory. Public Counsel argues that under court order the compensatory character of the rates cannot be relitigated and warns against such relitigation if the compensatory character is considered in mitigation.

AEL argues that the reduced rates were compensatory, that it disagreed with other AGAFBO members that the rates were not compensatory, and that surely AEL should not be penalized for having charged fully compensatory rates. It emphasizes that it had a limited subsidized berth service to the U.K./B-H range, that such service was dedi-

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we have to live with. U.S. Lines joined by Export, Isbrandtsen, Moore-McCormack, States Marine-Isthmian have not favored our approach. Except for States Marine, the others have been more or less USL controlled and there has been little we can do except get out of AGAFBO which forfeits much that is important to us in the Far East and Mediterranean, for which reason we were reluctant to take such a step. In the meantime, the fight goes on with MSTS and is also being waged with DOD, and there is some prospect that success will be had through the DOD-Secretary of Navy avenue. Under these circumstances, we have not attempted to follow by an analysis in depth, each of the Sapphire ships, but I am convinced of this; it may take time but we will eventually whip this situation down to where Sapphire only gets a share, and this is the same as saying, he will have to go out of business." (Exhibit PC-123.)

cated to carriage of commercial not military cargo, and that the only military commodity for which there might have been any actual rate competition between Sapphire and AGAFBO was the carriage of TGBL-HHG.

We note that AEL's subsidized berth service to the U.K./B-H range was limited and was dedicated primarily to carriage of commercial cargo, with only a small percentage of military household goods. It suffered a loss on all voyages in this range during the violation, before and after subsidy. It was originally opposed to any rate reduction and consented to reducing the TGBL-HHG and FIO-HHG rates based on advice of counsel. It agreed to reduction of the general military cargo rates only after the breaking up of AGAFBO appeared imminent without such reduction. However, AEL did attend every relevant AGAFBO meeting, did have a keen interest in the Sapphire situation, did vote for the condemned rate reductions, even if reluctantly, and did support their repeated extensions.

As for the compensatory character of the rate reductions, AEL voted for the March 9, 1965 motion to reduce the AGAFBO military TGBL-HHG cargo rate. That motion described the rate reduction as not compensatory even though AEL now contends the reduced rates were compensatory in that they covered fully distributed costs as well as out of pocket costs. Further, the FMC found such rates were so unreasonably low as to be detrimental to the commerce of the United States and the court has ordered us not to relitigate that finding. We therefore are precluded by trade respondents' admissions and court order from reopening the matter as a mitigating factor.

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(iii) *Mormac*—The Chief Judge found that although Mormac was originally reluctant to join in the condemned rate reduction actions, it decided to do so for competitive reasons, despite the fact that military TGBL-HHG cargo represented a minimal amount of its cargo. Mormac emphasizes that it had a limited number of calls in the B-H range and that it acted to extend the rate reductions because it feared to lose substantial amounts of military cargo to Waterman and not because of any motive to injure Sapphire. Mormac states it did not solicit the military TGBL-HHG cargo because the van lines were delinquent in making payment of ocean freight charges.

Essentially, Mormac's individual situation is the same as that of AEL's. Both had limited subsidized service in the U.K./B-H range which suffered losses after subsidy; both carried primarily commercial cargo and very little military household goods; both were reluctant initially to agree to the condemned rate reductions; both did in fact vote for the reductions; and both continued to vote for the reductions until the rates reverted to their former levels.

(iv) *Bloomfield*—The Chief Judge found that Bloomfield had no continuous competition with Sapphire and that Bloomfield's participation in the Section 810 violation was minimal—"primarily in the form of two telephone call votes, one of which was ineffectual." He noted, however, that on both occasions Bloomfield agreed to extend the rate reductions and that it had filed a discriminatory suit against Allied Van Lines and Pioneer for overdue freight. He recommended recoveries from Bloomfield be halved on account of its minimal participation.

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Bloomfield vigorously protests the Chief Judge's finding of any recovery and argues that its insignificant participation in AGAFBO warrants no sanctions under Section 810. It explains that one telephone call vote was after the motion had been defeated and the other was a proxy exercised at a time when it had three of its vessels chartered to the military. It claims it is unfair to impose sanctions against Bloomfield, who lost $500,000 in 1965 after subsidy, and who participated less in AGAFBO actions than did the non-trade respondents. It argues that the evidence regarding the lawsuit against van line customers was improperly and prejudicially admitted into the record by the Chief Judge, and that such evidence must be excluded. Finally, it argues that recovery against Bloomfield would serve no purpose because it has been out of business for some years and could not impede Sapphire's reentry into shipping.

Public Counsel replies that there does not appear to be any prejudicial error in the admission into evidence of the fact of the van line lawsuit for the limited purpose indicated. He commented in proposed findings before the Chief Judge that Bloomfield evidenced an attitude of reckless apathy towards its responsibilities of AGAFBO membership by absolutely deferring to other members. As for Bloomfield's defunct status, he points out that the arguments for no recovery ignore the fact that the Government is withholding $120,000 of subsidy accrued during the period and that the benefits of reduced recovery will inure to the surviving parent, States Marine Lines, Inc.,[52] and

[52] States Marine Lines, Inc., and Waterman part-time, were the other AGAFBO U.K./B-H range carriers during the period of violation.

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that any recovery could not contribute to the loss of a participant in the U.S. merchant marine, since Bloomfield is already defunct.

Bloomfield operated only in the Gulf on T.R. 21 with four C-2's carrying primarily commercial cargo. Until December 1965, it was a subsidized operator and member of AGAFBO, with the right to vote on U.K./B-H range issues; however, it attended only two AGAFBO meetings out of 21 during the time period discussed. Although it voted only twice on the AGAFBO rate reductions in the U.K./B-H range, both times it voted for such reductions. It had on file at the FMC the AGAFBO tariffs and it carried military cargo pursuant to those tariffs. While it was a small organization its disregard of its responsibilities as an AGAFBO member, especially when that organization was taking action found to have intended to crush other U.S.-flag competition, cannot be condoned.[58] Apparently, copies of AGAFBO minutes and pertinent

[58] An executive for Bloomfield explained that company's participation in AGAFBO as follows:

> "We decided to join, somewhere in the prior years—our participation was inactive, so to speak. We followed the deliberations and the activities of the meetings through the minutes and occasional telephone calls from Mr. Hansen. Our feeling was, being a new company and emphasizing concentrating on developing commercial packages, we felt we couldn't persuade this matter.
>
> We were down in the Gulf Coast. We had representatives in other companies and representatives in New York. It was possible for them to attend. We didn't feel our voice would be persuasive one way or the other. We felt these older lines and bigger lines, and longer established lines—we expected and hoped the decisions they reached would be good ones." Tr. 1364-65.

information were regularly sent to Bloomfield and it could have submitted, as it did on at least one occasion,[54] a proxy vote on important matters, such as the condemned rate reductions. The complaint of admission into evidence of the fact of an alleged Bloomfield discriminatory van line lawsuit is mooted in view of our finding that it has not been established that the AGAFBO van line credit policy was tied in any material manner to the condemned rate reductions. Bloomfield's present defunct status presents no basis for mitigation. While the defunct status does remove any possible competition between it and the also defunct victim, it does not remove the issue of the effect of Section 810 violations upon future U.S. operators finding themselves in similar circumstances.

(v) *USL*—The Chief Judge found that USL agreed to the rate reductions to protect its van line customers and to retain a share of the military cargo. The Chief Judge also found that for the most part USL thereafter opposed any and all rate reductions but that USL shares responsibility with the other followers for violating Section 810.

USL denies that it was a part of any "conspiracy" to drive Sapphire from the U.K./B-H range and argues it assented to temporary rate reductions only to protect its van line customers and deter others from following Waterman. It argues it has been punished enough by the loss it sustained on military cargo carried during the period at the reduced rates it tried to prevent.

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[54] Exhibit USL-8.

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USL is presently an unsubsidized operator. It had a very extensive subsidized operation on the U.K./B-H range during the period of violation, operating predominately a commercial service. It was initially opposed to any AGAFBO rate reductions to match the Sapphire rates but did agree to the initial reductions on military household goods on a temporary basis, principally to protect its van line customers. It agreed to reduce temporarily the AGAFBO rate on general military cargo, only to avoid disembodiment of AGAFBO. It offered the unsuccessful motion on April 23, 1965, to permit the FIO-HHG rate to revert to the former level. It voted extending the rate reductions on July 27, September 22, and October 25, 1965.

There is a further unique circumstance involving USL's operation, i.e., its passenger ship SS UNITED STATES operated with subsidy on T.R. 5-7-8-9 during this time period. In view of the dissimilarity of passenger and cargo ship operations and of Sapphire having operated no passenger ships, we are persuaded, as a matter of discretion, that recovery from USL for past violation of Section 810 should not be related to subsidies received for such passenger ship operations. No other trade respondent operated any passenger ship on a subsidized service on the U.K./B-H range during the period of violation.

IV. *Recoveries Under Section 810*

Section 810 of the Act provides as follows concerning recoveries for violations thereof:

> "No payment or subsidy of any kind shall be paid directly or indirectly out of funds of the United States or any agency of the United States to any contractor or charterer who shall violate this section.

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> **Any person who shall be injured in his business or property by reason of anything forbidden by this section may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."**

The interpretation of "payment or subsidy" and ancilliary language is disputed, as well as the application of the statute to the circumstances of each individual trade respondent. Mr. Safir also disputes the extent to which the statute is intended to aid the victim, other than providing for a private treble damage suit in court.

A. *"Payment or Subsidy"*

The Chief Judge, supported by Public Counsel, found that "payment or subsidy" includes ODS, rate subsidies on carriage of preference cargoes paid by the executive departments (such as Agriculture, A.I.D.), the privilege of depositing earnings in tax deferred ship replacement reserves, the extent the charter hire rate under a use agreement executed pursuant to Section 510(d) of the Act is less than the commercial rate, and the extent the sales price for Government owned vessels purchased pursuant to Section 704 of the Act and the Merchant Ship Act of 1946, 50 U.S.C. App. 1735, are less than commercial prices because of reduction by any applicable CDS less depreciation. He found that pursuant to Title V, CDS was paid to the shipyard, not the shipowner, and was not recoverable under Section 810 against the shipowner. On these premises the Chief Judge urged total recoveries from Lykes of $5,071,399.69;

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from AEL of $168,885.82; from Mormac of $1,135,233; from USL of $3,451,715.17; and from Bloomfield of $91,579.

Public Counsel is of the opinion that the Chief Judge's formula for ODS recovery (percentage of ODS received for carriage of military cargo in competition with Sapphire) is the rock bottom that will provide any effective deterrence to violations of Section 810. He considers that "payment or subsidy" in the context of the Merchant Marine Act is limited to those aids provided to the maritime industry. He includes "payments" within "subsidies" and defines that term as follows:

> "A subsidy is an act by a governmental unit involving either (1) a payment, (2) a remission of charges, or (3) supplying commodities or services at less than cost or market price, with the intent of achieving a particular economic objective, most usually the supplying to a general market a product or service which would be supplied in as great quantity only at a higher price in the absence of the payment or remission of charges. (Joint Committee Print, Subsidy-Effect Programs of the U.S. Government, 89th Cong., 1st Sess. 9 (1965)."

Trade respondents argue that Section 810 is designed to take away only the advantages ODS operators have under the 1936 Act over unsubsidized operators. If interpreted as applicable to factors other than ODS, they believe Section 810 to be irrationally discriminatory and of questionable validity. Further, they claim that Section 810 is penal in purpose and therefore is to be narrowly defined. In other words, they contend Section 810 only provides for recovery of ODS "paid for service on the route and to the ports served by a competitive U.S.-flag common carrier entitled to the protection of Section 810, limited to the period of such competition."

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Mr. Safir argues that Section 810 applies to "[a]ll subsidies and payments actually accrued during, or reasonably allocable to, the period of violation," and that no basis exists for constricting consideration of recovery to certain types of vessels, trade routes, ports, direction of carriage or vessel-to-vessel departure dates. He includes, in addition to those recoveries recognized by the Chief Judge, CDS under Title V, based on the 11 month period of violation in relation to the useful life of ships; "the premium paid on all cargoes moved during the eleven (11) month period for the Department of Defense"; and interest from the date of violation on all recovered subsidies. His measure of recovery of ODS and premium freights is "a refund equivalent to the same percentage reduction as the AGAFBO rates were dropped in the North Atlantic to drive Sapphire out of business." He claims that it "was the protection of this premium freight plus the van line credit agreement that kept, both the trade and non-trade respondent's together as co-conspirators." Mr. Safir has indicated that under this approach the gross recovery approximates half a billion dollars and that the entire amount might possibly be waived "if the interests of the victim in his desire to return to the shipping industry have been satisfied."

In determining the standard for recovery for past violations of Section 810, we consider the legislative history of the Act, its language, and standard principles of statutory construction. The 1936 Act provided a new method of subsidizing the U.S. shipping industry primarily by CDS and ODS. During the course of the Senate floor debate preceding enactment, it was noted that there had been testimony that a "United States line which operates between the port of New York and South Africa, and enjoys a subsidy from the Government of the United States, is in agreement with

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British lines, foreign lines, crushing out of existence an American line which enjoys no subsidy, and which operates between the port of New York and South Africa" and that "an American line which is in competition with all the conference lines . . . assured [the Senate committee] . . . that without any subsidy, if removed from the incubus of this conference and of the subsidy which is granted to the American subsidized line, [it] could compete with all the lines of the world." [55] It was thereafter commented that in considering a subsidy to be paid to shipping concerns for the purpose of building them up Congress should scarcely permit a condition to exist which apparently would result in tearing down American shipping.[56] Based upon this senatorial colloquy an amendment, which eventually became Section 810, was proposed the next day with the comment that "it is the intention of Congress not to pay subsidies of any kind to any American line which is willing to enter into any combination with other lines, including those operatng under foreign flags, to crush American competition." [57]

The first paragraph of Section 810 states, "It shall be unlawful for any contractor receiving an operating subsidy under Title VI or for any charterer of vessels under Title VII" to engage in certain specified conduct in regard to certain U.S.-flag citizens operating as a common carrier by water. The first sentence of the second paragraph states, "No payment or subsidy of any kind shall be paid directly or indirectly . . . to any contractor or charterer who shall violate this section."

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[55] 80 Cong. Rec. 9921 (1936).
[56] *Id.* at 9922
[57] *Id.* at 10075.

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The legislative history and the statutory language show that Congress had two principal concerns in enacting Section 810: primarily, removal of the added burden that U.S. payments to the violators imposed on the victim; and secondarily, imposing a deterrent effect on any contemplated violations and especially to induce cessation of current violations. The Second Circuit concluded that these objectives are extended to recovery for a past violation and that Congress sought by such recovery to impose "an added cost on the violators and thus . . . partially make up to the victim for the burden which the earlier payments indirectly imposed on him." [58]

It follows that recovery for past violations requires a different standard for recovery of "payment or subsidy," as contemplated in Section 810, than non-payment for existing violations.[59] The instant violation ceased long be-

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[58] *Safir* v. *Gibson*, 417 F.2d 972, 977 (2d Cir. 1969). Trade respondents argue that under the Second Circuit decision recovery for past violations of Section 810 is based on common law principles and not statute. However, the Second Circuit merely stated the statute did not expressly authorize such recoveries. It found by necessary implication from common law principles that "§ 810 was designed to promote the competitive interest of a victim by authorizing the recovery of subsidies improperly paid in the past." *Id.* at 978. Thus, recoveries considered in this proceeding are grounded on statutory authority, as interpreted by the Court.

[59] In *Safir* v. *Gibson*, 417 F.2d 972 (2d Cir. 1969), the Second Circuit found: a) " . . . the duty of the administrator may be less absolute [for recovery of subsidies improperly paid in the past to violators] than is the obligation to cease payments to current violators." *Id.* at 977, b) "So far as concerns payments, as distinguished from recoveries, the statute is mandatory where

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fore it was established to be a violation and requiring return of all subsidies and payments made by the Government to the violators for the period of the past violation would appear to result in frustrating the general policy of the Act to foster the development of the U.S. merchant marine. Some guidance to the intent of Congress in requiring recovery of "payment or subsidy" paid during past violations is provided from the legislative history showing its concern was in the content of the ocean mail subsidy being paid at that time and the operating subsidy to be provided by the 1936 Act. Further, Congress carefully drafted Section 810 to apply only to Title VI contractors and Title VII charterers,[60] who generally receive operating subsidy; it conspicuously failed to mention Title V contractors, who receive the benefits of construction subsidy. Such careful drafting avoided an imposition of recovery which would have resulted in discriminatory treatment against ODS contractors with no overriding public policy being served by the return of all payments inasmuch as the violation has ceased. Discriminatory treatment of ODS contractors would result if CDS or premium payments on P. L. 480 preference cargoes were required. That is to say, the ODS operator would be treated more harshly under

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applicable . . . and perpetual debarment would be an exceedingly harsh result, which might fatally interfere with the general policy of the Act to foster the development of the American Merchant Marine." *Ibid.* c) "While the Maritime Administrator may have some discretion in connection with the recovery of past subsidies as distinguished from payments to current violators, the discretion is not unlimited." *Id.* at 978. *Accord,* Safir v. Gibson, 432 F.2d 137, 140 (2d Cir.), *cert. denied,* 400 U.S. 972 (1970).

[60] None of the respondents were Title VII charterers and therefore the issue of what recoveries Section 810 requires of such persons who violated the statute in the past is not before us.

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the 1936 Act and other shipping laws of the United States than the non-ODS operator who received only CDS or a non-ODS AGAFBO carrier who received P. L. 480 premium payments and who, as it has been found, committed the same unjustly discriminatory and unfair actions toward Sapphire as did the respondents in this proceeding. Statutes are to be construed rationally and to avoid producing inequality and injustice, if another and more reasonable interpretation is apparent.[61] Consistent with this rule of statutory interpretation, and for the reasons stated, we conclude that Congress did not intend recovery in excess of ODS payments.

As previously discussed, it is our view that we have discretionary authority under the statute to determine whether and to what extent to recover ODS for past violations of Section 810 from Title VI contractors in order to implement the policies of the Act.[62] We have also previously considered certain general mitigating factors raised by trade respondents, including reliance on advice of counsel and the Waterman's nearly concurrent competitive challenge, and concluded they were of some significance to the respondents' action in making the condemned rate reductions. It is our judgment that these general mitigating factors warrant limiting recovery of subsidy payments to those made for the operation on the trade routes covered by the condemned rate reductions. There is a further general mitigating circumstance that we consider carries par-

[61] *E.g., Shattuck* v. *Gallagher*, 218 F.2d 428, 429 (6th Cir. 1955); *Johnston* v. *United States*, 163 Ct. Cl. 375, 379, (1963); *Yankee Network* v. *F.C.C.*, 107 F.2d 212, 219-20 (D.C. Cir. 1939); 3 Sutherland, *Statutory Construction* § 6006 (3d ed. Horack 1943).

[62] See pp. 20-22 *supra*.

ticular weight, namely, this is the first case imposing, or even contemplating imposing, recoveries for past violations of Section 810. Under such circumstances and considering the extended consideration which has been required of this matter, the respondents cannot be said to have been fully aware of the extent of financial consequences for past violations. After carefully considering all of the facts and policy objectives of the Act applicable to trade respondents' violations, we are persuaded to further limit their recovery to the same percentage of specified ODS payments as military cargo revenues bore to total revenues on the trade routes whereon the condemned rate reductions were in effect.

In deciding that Section 810 provides only for recovery of ODS payments for past violations, which may be reduced in our discretion, we have concluded that other forms of Government "payment or subsidy" are not recoverable. Interest charges are also not recoverable since interest is not and cannot be an element of ODS payments.

B. *Individual Recoveries*

We have decided not to seek recoveries from the non-trade respondents due to their mere technical violations of the Act. We have also decided to limit recoveries from trade respondents due to general mitigating circumstances previously discussed. In addition, we decided to further limit recoveries from certain, but not all, trade respondents due to their individual mitigating circumstances.

(1) *Lykes*

The special circumstances asserted by Lykes present no basis for any greater mitigation than is recognized as ap-

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plicable in general mitigation for trade respondents. Hence, the amount to be recovered from Lykes is the percentage of ODS received from subsidized operations on the U.K./B-H range, as represented by the ratio of military cargo revenue received on such route to total revenues received therefrom during the period of violation.

During the 11 month violation, Lykes operated a liner service on Trade Route 21, Line B-2, U.S. Gulf ports—East Coast U.K. and Continental Europe (Bordeaux/Hamburg) and Line B-1, Gulf to W. Coast U.K. and Ireland, under subsidy contract FMB-59. On such services Lykes accrued total ODS payments of $3,227,999.93 for the period March 30, 1965 to March 1, 1966. Lykes claims it received total revenues from subsidized service on T.R. 21 during that period of $9,057,528.95. That revenue, however, is just the amount generated by vessel operations calling on T.R. 21 ports served by Sapphire. The total revenue generated by Lykes service on T.R. 21 during that period does not appear of record. For present tentative purposes we will use the $9,057,528.95 figure and presume until further documentation is provided that the same Lykes' ratio of military cargo revenue to total revenues is derived for total service as for that part served by Sapphire. It appears that on the same restricted basis Lykes generated revenues from general military cargo and TGBL-HHG of $3,170,891.68 (Exhibit Lykes—6A & B) or 35.01% of the total revenues received on ports served by Sapphire on T.R. 21. On the basis of these assumptions, Lykes owes in recovery for violating Section 810 about $1,130,123. Therefore, we find that upon terms satisfactory to the Board, Lykes must refund approximately such sum or forego future subsidies until that amount has been satisfied.

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(2) *AEL*

The special mitigating circumstances relative to AEL have been enumerated concerning its limited service on the U.K./B-H range and reluctant but eventual participation in the condemned rate reductions. Such circumstances, in our judgment, merit some further mitigation of recoveries, although the amount to be reduced is not susceptible of exact measurement. In our judgment, we consider the record supports a 25% reduction in recoveries that would otherwise be required.

Under ODS Contract No. FMB-87 AEL during the period of violation maintained an unsubsidized liner service on T.R. 5-7-8-9 between U.S. North Atlantic ports and ports in the United Kingdom and Continent (Line H) and a subsidized liner service on T.R. 5-7-8-9 after the close of the Great Lakes navigation season (Line G). Presently, AEL has no subsidized liner service on T.R. 5-7-8-9, but it has other services which are subsidized under FMB-87. For the subsidized voyages on the U.K./B-H range during the period March 30, 1965 to March 1, 1966, AEL accrued total ODS of $203,511. It appears from the record that such voyages generated a total revenue of $488,643 of which commercial cargo accounted for $372,478 and military cargo $116,165 (Exhibit AEL-G). AEL maintains that it did not separately account for TGBL-HHG since it amounted to only about 1½% of total commercial cargoes and was not statistically important. The 1½% of $488,643 would amount to $5,587. Therefore, total military cargo revenue for AEL's subsidized service on T.R. 5-7-8-9 for the period of violation amounted to about 24.92% of total revenues. That percentage indicates AEL owes in recovery $50,715, which when reduced by 25% is $38,036. AEL must refund this approximate sum to the Board on satisfactory terms.

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(3) *Mormac*

The special mitigating circumstances for Mormac have been found to be similar to those for AEL and therefore the additional reduction of recoveries due to such circumstances will be by the same percentage (25%) as for AEL. During the period of violation Mormac operated a subsidized liner service on T.R. 6 between U.S. North Atlantic ports and ports in the Baltic Sea and was authorized to make calls on T.R. 5-7-8-9 at Rotterdam and Antwerp and (with a waiver from USL) at Bremerhaven, under ODS Contract FMB-48 Revised. Forty of Mormac's total subsidized voyages eastbound touched at ports on the U.K./B-H range and twenty-two subsidized voyages westbound. Its total accrued ODS for the period March 30, 1965 to March 1, 1966, for service on T.R. 6 with calls on T.R. 5-7-8-9 was $2,359,290. The comparable ODS figure for only the calls on T.R. 5-7-8-9 is not of record. A total of $980,000 in ODS remains effectively unpaid due to a court injunction. The company asserts that $560,000 of that amount represents funds accrued during the period of violation. During the period March 30, 1965 to March 1, 1966, it earned revenues from general military cargo and TGBL-HHG cargoes of $3,018,022 from the U.K./B-H range out of total revenues for the range of something less than $10,836,080.[63]

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[63] The military cargo revenue figures include revenue from carriage of military refrigerated cargo since we are not persuaded to further mitigate Mormac's recovery to exclude such cargo, even though Sapphire's carriage of such cargo was of a limited amount. The total revenue figure is an overapproximation since it includes commercial cargo revenue derived from ports outside of the U.K./B-H range. While Mormac Exhibit IV purports to indicate total revenue earned on the U.K./B-H range ($5,172,160), that figure seems questionable since it would indicate over half of the $12,001,201 total revenues earned on Mormac's entire North Atlantic operation were earned outside of the U.K./B-H range.

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Using such figures until we receive further documentation and under the formula heretofore stated, we find Mormac would owe $656,590 in recovery. That amount reduced 25% for special mitigating circumstances to $492,443 is the amount approximately to be withheld from that presently owing Mormac as recovery for violation of Section 810.

(4) *Bloomfield*

The special circumstances of Bloomfield, as previously discussed, have both mitigating and non-mitigating aspects. Its actual participation in the AGAFBO condemned rate reductions was minimal, but it did support the rate reductions. Its minimal participation was not due to any opposition or concern over the rate reductions but rather to a nearly complete faith that whatever the majority voted would be good for all. It is certainly not sound public policy to countenance such disregard by Bloomfield of its responsibility as a conference member by mitigating wholly or almost completely any recoveries due for its violation of Section 810. Upon weighing all the circumstances, however, we consider that a similar reduction in recoveries (25%) for Bloomfield, as permitted for AEL and Mormac, is warranted.

Bloomfield had a subsidized liner service on Trade Route 21 between the Gulf and North Europe during the period of violation under ODS Contract FMB-27 only until December 31, 1965. On June 9, 1971, its successor, E.P. Shipping Company, filed with the State of Delaware a certificate of corporate dissolution, having earlier liquidated. Previously, all stock passed to States Marine Lines, Inc. on January 3, 1966. The company earned total accrued ODS during the period of violation of $758,163. By court

injunction $120,000 in ODS accrued during that time has been withheld. On a tonnage basis the military cargo carried by Bloomfield (including TGBL-HHG) was 24.7% of total carriage.[64] Presuming, until further documentation, that the percentage would be the same for revenues from such cargo in proportion of total revenues, Bloomfield owes approximately $140,450, accounting for the 25% mitigation, in recovery for violation of Section 810. The withheld $120,000 of ODS due is hereby acknowledged as partial satisfaction of amounts owing for such violation.

(5) *USL*

The initial reluctance and then opposition to the condemned rate reductions by USL have been discussed. It appears USL actively sought to have AGAFBO terminate the rate reductions long before the AGAFBO U.K./B-H range carriers collectively terminated such reductions. While these circumstances in no manner enable USL to escape from liability for the conference actions, they are important to the recoveries to be imposed for these past violations. We are persuaded that USL's recoveries should be substantially reduced, namely by 50% from the amount that would otherwise be due.

During the period of violation USL operated a subsidized liner service on T.R.'s 5-7-8-9 and 11 under ODS Contract FMB-19, but it no longer has any ODS agreement with the Government. Total ODS accrued during the period March 30, 1965 to March 1, 1966, for USL operation on the U.K./B-H range was $17,853,204. That amount

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[64] Bloomfield's subsidy figures are calculated from Exhibits BL-1 and PC-169. The tonnage figures are for the period April 1, 1965 to December 30, 1965, only (Exhibit BL-10). The record apparently contains no comparable, legible revenue figures.

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includes subsidy for the passenger ship the SS UNITED STATES, which when excluded, results in net ODS of $11,082,875. The extent of military and TGBL-HHG cargo revenues from operation on T.R. 5-7-8-9 during this time period in relation to total revenues is controverted, the Chief Judge claiming 30% and USL 17.5%.[65] Accepting for the present, until further documentation is provided, USL's figure and that the same ratio would be applicable to T.R. 11 operations, we find USL would owe $1,939,503 in recovery for violation of Section 810, which reduced by 50%, results in about $969,752. Approximately such sum must be refunded to the Board upon satisfactory terms.

C. *Recoveries or Benefits to Mr. Safir.*

Mr. Safir throughout the proceeding has argued that the Second Circuit in *Safir* v. *Gibson* desired a nexus between the sanctions of Section 810 and the victim's competitive interest in re-entering the shipping industry. He has proposed, for instance, that he waive his standing in this case in return for the stock of one of the respondents. Neither the Chief Judge nor Public Counsel were persuaded by Mr. Safir, and obviously the respondents were opposed to any such proposal. Moreover, even if he had never protested the conference's action, the Board would be required under the statute to act whenever it becomes aware of any violation of Section 810.

We are unaware of any authority for Mr. Safir's suggestion or argument. Section 810 provides for a private treble damage suit so that the victim may recover for

[65] USL's subsidy figures are contained in Exhibit USL-13. There appears to be no record documentary evidence of the ratio of military cargo revenue to total revenue during the period of violation.

"damages by him sustained". Recoveries required as a result of this proceeding are not under authority of that part of Section 810 but rather the following:

> "No payment or subsidy of any kind *shall be paid* directly or indirectly *out of funds of the United States or any agency of the United States* to any contractor or charterer who shall violate this Section." (Emphasis added.)

That provision is concerned with Government funds paid to an ODS contractor and therefore concerns the recovery of the Government's payments. No authority is cited for paying over such Government payments, which are recovered, to a private person or corporation. Further, no authority is cited to require a subsidized operator to pay stock or any other property or moneys to a private person or corporation under such provision. Again, Mr. Safir's remedy is provided separately from the Government's recovery of moneys paid.

As we understand the Second Circuit's decision, the Court in making statements such as the following:

> "Recoveries of such payments poses an added cost on the violators and thus will partially make up to the victim for the burden which the earlier payments indirectly imposed on him." [66]

was finding that the victim had an interest and standing to see that a decision was rendered on whether to recover past payments. Such payments, recovered by the Government, would remove operating subsidy from the violators and hence "partially make up to the victim" the former burden it had in encountering the violators with their operating subsidy advantage.

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[66] *Safir* v. *Gibson*, 417 F.2d 972, 977 (2d Cir. 1969).

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CONCLUSION

Based upon the foregoing discussion and findings and after full consideration of the record compiled in this proceeding, including all arguments and presentations by all parties and the Chief Judge's Recommended Decision, we find and conclude that:

1) All respondents violation Section 810 of the Merchant Marine Act, 1936, as amended, and applicable provisions of their ODS contracts by acting in concert to reduce rates on selected military cargo carried in U.S. Atlantic & Gulf to United Kingdom/Bordeaux/Hamburg area and holding such rates at such levels during the period March 29, 1965 to March 1, 1966 (but as to respondent Bloomfield only until and including December 31, 1965) in order to unjustly discriminate and unfairly compete against Sapphire Steamship Company, and

2) In consideration of pertinent mitigating circumstances respondents owe. Subject to documentation by said respondents and Public Counsel, the following for such violations of Section 810:

   (a) Respondents APL, Farrell, Grace and Prudential, who did not compete with Sapphire and whose violations are technical only, no amount;

   (b) Respondent Lykes about $1,130,123 to be accounted for on terms satisfactory to the Government;

   (c) Respondent AEL about $38,036 to be accounted for on terms satisfactory to the Government;

EXHIBIT A—Annexed to Foregoing Affidavit

Opinion and Order of the Maritime Subsidy Board, Dated April 16th, 1973

(d) Respondent Mormac about $492,443 to be withheld from operating subsidy amounts presently owed and incurred during the period of violation;

(e) Respondent Bloomfield about $140,450 partially to be withheld from operating subsidy amounts of $120,000 accrued during the period of violation but not yet paid;

(f) Respondent USL about $969,751 to be accounted for on terms satisfactory to the Government.

Trade respondents, and Public Counsel as he deems necessary, are to submit on or before May 16, 1973, their views and supporting documentation on the exact ODS amounts recoverable for violation of Section 810 consistent with the decision herein. Any replies to such submissions are to be filed within ten days after service of such submissions. An order determining final recoveries will thereafter be issued. Upon issuance of said order on final recoveries this decision will become final.

So Ordered by the Maritime Subsidy Board/Maritime Administration.

Dated: April 9, 1973

AARON SILVERMAN
Assistant Secretary

EXHIBIT B — Annexed to Foregoing Affidavit

No. 388

Brief for the Government Respondents in Opposition, Dated August 1970

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

MARSHALL P. SAFIR ET AL., PETITIONERS

v.

ANDREW GIBSON ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE GOVERNMENT RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The first opinion of the court of appeals (Pet. App. 70a-79a) is reported at 417 F.2d 972; the court's two subsequent opinions (Pet. App. 7a-17a; and Pet. App. 1a-3a) are unreported. The district court's first opinion (Pet. App. 79a-85a) is reported at 297 F. Supp. 630; its second opinion (Pet. App. 19a-21a) is unreported.

EXHIBIT B—Annexed to Foregoing Affidavit

Brief for the Government Respondents in Opposition, Dated August 1970

JURISDICTION

The judgment of the court of appeals was entered on February 26, 1970. Timely petitions for rehearing were denied on June 18, 1970. A petition for a writ of certiorari was filed on July 14, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the determination of the Federal Maritime Commission that a shipping conference violated Section 15 of the Shipping Act, 1916, by setting unfairly low rates designed to, and which did, divert business from a non-conference carrier, required the Maritime Subsidy Board of the Maritime Administration to terminate the subsidies paid to the conference carriers under the Merchant Marine Act, pursuant to Section 810 of that Act.

STATUTE INVOLVED

Section 810 of the Merchant Marine Act of 1936, 49 Stat. 2015, 46 U.S.C. 1227, provides:

> It shall be unlawful for any contractor receiving an operating-differential subsidy under subchapter VI of this chapter or for any charterer of vessels under subchapter VII of this chapter to continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States

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who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.

No payment or subsidy of any kind shall be paid directly or indirectly out of funds of the United States or any agency of the United States to any contractor or charterer who shall violate this section. Any person who shall be injured in his business or property by reason of anything forbidden by this section may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

STATEMENT

This is an action brought by Sapphire Steamship Lines, Inc., and two of its officers and stockholders, seeking to compel the Maritime Administrator and members of the Maritime Subsidy Board (a part of the United States Department of Commerce)[1] to take action pursuant to

[1] The functions now performed by the Federal Maritime Commission and by the Maritime Subsidy Board of the Maritime Administration were originally vested in the United States Maritime Commission. By Reorganization Plan No. 21 of 1950, 64 Stat. 1273, and Reorganization Plan No. 7 of 1961, 75 Stat. 840, the rgeulatory functions of the U.S.M.C. were transferred to the Federal Maritime Commission; an indpendent agency, and the U.S.M.C. functions relating to the award, amendment and termination of subsidy contracts were transferred to the Maritime Administration, a part of the Department of Commerce.

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Brief for the Government Respondents in Opposition Dated August 1970

Section 810 of the Merchant Marine Act of 1936, 46 U.S.C. 1227, against shipping companies which ahe members of a shipping conference known as the Atlantic and Gulf American Flag Berth Operators (AGAFBO).

Sapphire began operations as an unsubsidized water carrier in March 1965, and undercut the rates of several carriers which were AGAFBO members. Shortly afterwards, AGAFBO reduced its rates on those routes on which its members competed with Sapphire. As a result, Sapphire lost business and subsequently went out of business in March 1967. It was adjudged a bankrupt in May of that year (Pet. App. 70a). On March 1, 1966, AGAFBO had raised its rates to their former levels.

After a broad investigation on its own motion of "virtually the entire spectrum of practices surrounding the procurement of ocean transportation of U.S. military cargoes" (Pet. App. 23a), including the events outlined above, the Federal Maritime Commission issued a report (Pet. App. 22a-65a), concluding that (Pet. App. 53a-54a):

> [AGAFBO's] reduced rates were simply an attempt to deprive Sapphire of some of the cargo which Sapphire expected would be generated by its rates. And AGAFBO, by its means of its reduced rates, did in fact deprive Sapphire of the nucleus cargo which was indispensable to Sapphire's profitable operation. Under these circumstances, we find that the AGAFBO agreement, through its ratemaking functions, operated in a manner which was knowingly at odds with the requirements of section 18(b)(5) [of the Shipping Act 1916, as amended, 46 U.S.C. 817(b)(5)] and which was detrimental to the commerce

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Brief for the Government Respondents in Opposition, Dated August 1970

> of the United States and contrary to the public interest as well. AGAFBO's rates were detrimental to commerce because they were designed to and did have a disastrous effect on Sapphire [footnote omitted]. AGAFBO's rates were contrary to the public interest because they were predatory in nature and in derogation of an important aspect of the public interest, the policy to foster competition to the extent compatible with the regulatory purposes of the [Shipping] Act. * * * We therefore conclude that the AGAFBO agreement operated in a manner which was in violation of section 15 [of the Shipping Act, 46 U.S.C. 814].

Shortly after the Commission issued this report, Sapphire wrote to the Maritime Subsidy Board requesting that subsidy payments to AGAFBO members be terminated and that action be instituted pursuant to Section 810 of the Merchant Marine Act of 1936, 46 U.S.C. 1227, to recover subsidies paid since March 29, 1965, the date the AGAFBO carriers reduced their rates. The Board did not take action upon this request.

Sapphire then commenced this action in the district court, asserting that the AGAFBO carriers had violated Section 810 by the rate reductions which had driven Sapphire out of business, and that that Section required the Board to cut off any subsidies then being paid to any AGAFBO carriers and to start a legal action to recover those subsidies already paid after March 29, 1965, the date the tainted rate reductions went into effect (Pet. App. 86a-92a). The district court dismissed the complaint. The Second Circuit reversed, holding: first, that Sapphire

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and its owners had standing to question the Board's failure to seek recovery of subsidies pursuant to Section 810 (opinion of September 26, 1969, Pet. App. 70a, 77a); second, that Section 810 authorized the Board to withhold subsidy payments (or to recover back payments) only for the period during which a violation of the section was taking or had taken place (Pet. App. 77a); and, finally, that, with respect to the discretion of the Board to invoke Section 810, the Board "may not refuse to proceed against the AGAFBO lines without at least considering the interest of the victim * * *. There may be other limits on [its] discretion, but we need not decide this now" (Pet. App. 78a-79a). The court remanded the case to the Board so that the latter could "give clear indication that it has properly exercised the discretion with which Congress has endowed it" (*ibid.*).

Upon remand, the Board started an administrative proceeding, on notice to all concerned parties, to determine whether Section 810 sanctions should be invoked against AGAFBO carriers (Pet. App. 20a). At this point, Sapphire moved in the district court for an injunction restraining the Board from making any further subsidy payments to the carriers. Sapphire claimed that the court of appeals had held that the Board was compelled to invoke Section 810, and that the carriers were not entitled to receive further subsidy payments until they had refunded the payments made during the seven-month period when AGAFBO's reduced rates had been in effect. The district court denied this motion (Pet. App. 19a-21a), and Sapphire again appealed.

On this second appeal, the court of appeals (opinion of February 26, 1970; Pet. App. 7a-17a) upheld the dis-

trict court's denial of an injunction (*id.* at 7a-8a), but held that the Commission's finding that the AGAFBO carriers had violated Sections 15 and 18(b)(5) of the Shipping Act had the effect of conclusively determining, for the purposes of the Maritime Subsidy Board's proceeding then in progress, that the AGAFBO carriers had violated Section 810 of the Merchant Marine Act. The court of appeals reached this conclusion on the basis of the similarity of the operative language of Section 810 to that of Sections 15 and 18(b)(5), and of the fact that of the two agencies, the Commission rather than the Board "has the expertise to pass on whether rates are unfair or unduly discriminatory * * *" (Pet. App. 14a). But the court of appeals made it clear, in a footnote, that it was not requiring the Board to impose the Section 810 penalties upon the AGAFBO carriers (Pet. App. 17a, n. 2):

> Nothing we have said should be read as preventing the [Board] from investigating the nature and extent of the individual carriers' participation in the illegal action, should it find these matters relevant to its ultimate decision on whether to seek recovery of subsidies paid during the violation and, if so, how much and from whom.

Shortly after this opinion was rendered, the AGAFBO carriers moved to intervene and petitioned the court of appeals for rehearing. After permitting intervention and obtaining further briefs from the parties, the court denied rehearing.[2] In an accompanying opinion (June 18, 1970;

[2] The AGAFBO carriers had argued that the Commission's determination of their violation of Sections 15 and 18(b)(5) of the Shipping Act should not work a collateral estoppel in the Board proceedings, because the Commission made its determina-

Pet. App. 1a-3a), the court again stressed that in its February 26, 1970 opinion, it had expressly refused to hold that the Board was bound to invoke the Section 810 remedy against any of the AGAFBO carriers: "We directed only that the issue whether the reduction of the rates was unjustly discriminatory or unfair to Sapphire was not to be relitigated before the [Board] * * *" (Pet. App. 3a).

ARGUMENT

The court of appeals' holding that the Maritime Subsidy Board was not obligated to invoke the Section 810 remedy on the basis of the Commission's finding of violation of Sections 15 and 18(b)(5) was correct. There is no conflict among the circuits as the decision below is the first appellate ruling construing Section 810. Furthermore, review of the decision below at this point is premature as the Board is presently in the process of determining whether to invoke Section 810 against the AFAFBO carriers.

1. Sapphire asserts in essence that *any* violation of Section 15 of the Shipping Act determined by the Commission automatically requires the Board to invoke the Section 810 penalties cutting off subsidies for the period of the violation. It is our basic position that the Board has dis-

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tion after the violations had ceased. For that reason, the carriers asserted, they had no incentive to seek court review of the Commission's findings. The court rejected this argument, pointing out that the findings of Shipping Act violations had carried the possibility of $1000-per-day penalties, and that, indeed, the United States had later obtained settlements of claims based on the Sections 15 and 18(b)(5) violations of $25,000 from each offending carrier (Pet. App. 2a). The possibility of imposition of these penalties, the court held, provided sufficient incentive to seek review of the Commission's findings.

cretion to determine whether and when to invoke Section 810 against particular carriers, even after the Commission has determined that Section 15 has been violated.

Section 15 allows the Commission to disapprove, cancel, or modify "any agreement [among members of a conference] * * * that it finds to be unjustly discriminatory or unfair as between carriers * * *." Such an agreement may violate the statute even though the resulting discrimination or unfairness was not willful. *Unapproved Section 15 Agreement-Coal to Japan/Korea,* 7 F.M.C. 295, 303-304. Furthermore, there is great flexibility in the civil penalty provisions of Section 15, which permits a penalty of "not more than $1000 for each day such violation continues * * *." 46 U.S.C. 814.

By contrast, the penalty created by Section 810 is inflexible as it bars all subsidy payments for at least the period of the violation. Although the violation here was willful, petitioner's argument would require that the Section 810 penalty be imposed for any violation of Section 15. There is no indication that Congress intended Section 810 to have such a harsh result; the legislative history discussed by the court of appeals suggests that this section was intended to cover only willful violations (Pet. App. 74a-75a). Even for such violations, the Board has discretion to determine whether, in light of the[3] basic policies

[3] That Act provides (46 U.S.C. 1101):

"It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping services on all routes essential for

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underlying the Merchant Marine Act, the particular circumstances call for the termination of subsidy.

2. Review of the issue now would be inappropriate. The Board is conducting a proceeding to determine whether the Section 810 sanctions should be invoked here. Upon completing that action and making the "considered decision" directed by the court of appeals (Pet. App. 79a), the Board may invoke the remedy, thus rendering unnecessary further consideration of the issue pressed by Sapphire. Moreover, the record and Board decision will further illuminate the proper application of the statute. Finally, there is no showing that issue is sufficiently important to warrant review by this Court; the decisions below are the first reported appellate opinions on the point, even though the Merchant Marine Act of 1936 has been on the books for almost 35 years.

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maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States, insofar as may be practicable, and (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizens personnel. It is declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine."

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CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General.

ALAN S. ROSENTHAL,
DANIEL M. JOSEPH,
Attorneys.

AUGUST 1970.

EXHIBIT C — Annexed to Foregoing Affidavit

American President Lines, Ltd., Japan/Saigon Freight Conference, Dated July 15, 1965

MA
No. A-17

Decided: July 8, 1965

Served: July 15, 1965

[¶ 2:810] *Territorial scope of Section 810 of 1936 Act.*

While the language of Section 810 of the 1936 Act could support an interpretation that the prohibitions against a subsidized operator conforming to any agreement with another carrier, or engaging in any practice in concert with another carrier, which is unjustly discriminatory or unfair to any other U.S.-carrier exclusively employing vessels on any established trade route from and to a United States port, are not applicable to foreign-to-foreign segments of essential trade routes, the legislative history of the section shows that the section does apply to such segments. Furthermore, the Federal Maritime Board in 1954 and in 1956 so interpreted the section. It would be senseless to permit discriminatory practices on one segment of an essential trade route and condemn them on another.

[¶ 2:810] *Section 810 vis-à-vis Section 15.*

The limited territorial scope of Section 15 of the 1916 Act does not attach to Section 810 of the 1936 Act. The power of Congress to regulate is in no sense limited by any requirement that the conferences regulated involve an American port. When

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an attempt was made in 1938 to repeal Section 810, the proponents of repealer claimed that the section was redundant because Section 15 was adequate to curb the abuses which had prompted enactment of Section 810. While no final conclusion can be drawn from Congress' failure to repeal the statute, it is some indication that Congress recognized a difference in the territorial applicability of each.

[¶ 2:810, ¶ 160:18] *Obligation of Maritime to enforce Section 810.*

The fact that other American operators were disinclined to complain of the continued membership of a subsidized operator in a conference, in violation of Section 810, had no effect whatsoever on the Maritime Administration's obligation to cease subsidy payments to a violator.

[¶ 2:810] *Applicability of Section 810 to non-voting member of conference.*

A subsidized operator's continued membership in a conference governing a foreign-to-foreign trade which was a segment of an essential United States trade route would be in violation of Section 810, where other U.S.-flag operators, entitled to the protection of the section, had been denied conference membership. As to the contention that the conference agreement was not of itself unjustly discriminatory, that the operator was a non-voting member and, therefore, that it was not a party to and did not conform to any discriminatory practices, Section 810 refers to an operator continuing as a party to or conform-

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ing to any agreement which is injustly discriminatory, and such language is reflected in each ODS agreement. While the operator had no voting rights, it admitted that it was a party to and conformed to the agreement. Section 810 makes no mention of voting, nor does it divide membership into types or classes.

OPINION OF THE MARITIME ADMINISTRATOR, NICHOLAS JOHNSON

This proceeding involves the interpretation of Section 810, Merchant Marine Act, 1936, as amended (46 USC § 1227).

On July 24, 1962, American President Lines, Ltd. (hereinafter referred to as "APL") requested Maritime Administration approval of its entry as an associate member in the Japan/Saigon Freight Conference (hereinafter, "the Conference") under Article II-18(c) of Operating-Differential Subsidiy Contract FMB-76. The Office of Government Aid, Maritime Administration, advised in a letter dated August 3, 1962, that entry was approved subject to the submission of the Conference Agreement for review by the Maritime Administration, but cautioned: "Based upon this review, American President Lines, Ltd., may be required to amend, modify, terminate or withdraw from said agreement".

Under the Agreement, APL may carry a maximum of 800 revenue tons of cargo per month between Japan and Saigon on any one of its three services on essential Trade Route No. 29: (1) round-the-world service; (2) California to the Far East service; and (3) California to Indonesia/Malaysia via Japan service.

EXHIBIT C—Annexed to Foregoing Affidavit

American President Lines, Ltd., Japan/Saigon Freight Conference, Dated July 15, 1965

Pacific Far East Line, Inc., Waterman Steamship Corporation and American Mail Line Ltd., which are in a position to serve the trade between Japan and Saigon while engaged in their respective operations over trade routes found to be essential pursuant to Section 211(a) (46 USC § 1121(a)), Merchant Marine Act, 1936, as amended (hereinafter, "the Act"), have applied for membership in the Conference (Petition for Declaratory Order, p. 3). All have been rejected, with at least one American-flag operator, Pacific Far East Line, Inc., being denied membership while APL was an associate of the Conference (ibid).

On May 28, 1964, the Office of Government Aid, acting pursuant to authority delegated to it by Administrator's Order No. 58, as amended (March 22, 1963), directed APL to withdraw from the Conference for the reason that its continued membership would violate Section 810 of the Act. This directive was stayed on July 2, 1964 at APL's formal request. Earlier, in a conference of APL counsel and Maritime Administration officials, the former revealed their intention to make such a request and to file a petition for declaratory order. The petition, in the form of an adversary brief, was submitted to me on July 17, 1964.

In a letter dated January 11, 1965 and directed to APL counsel, I indicated my decision to undertake discretionary review of the order to withdraw in light of its special importance to the maritime industry and the proper administration of the maritime laws of the United States. Attached to that letter was a memorandum of law prepared by the Office of General Counsel, Maritime Administration, in answer to the arguments contained in the APL petition.

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American President Lines, Ltd., Japan/Saigon Freight Conference, Dated July 15, 1965

Counsel for APL submitted a reply memorandum. Section 810 of the Act (46 USC§ 1227) reads in pertinent part:

> "It shall be unlawful for any contractor receiving an operating-differential subsidy under Title VI or for any charterer of vessels under Title VII of this Act, to continue as a party to or conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States or any established trade route from and to a United States port or ports."

APL contends: (1) that Section 810 of the Act was incorrectly applied to it because that section extends to conferences governing trades between United States and foreign ports only and not those between foreign ports; and (2) that the Conference Agreement to which APL is a non-voting party is not *of itself* "unjustly discriminatory or unfair" within the statutory prohibition, and that without the power to vote APL is not a "party to" nor does it "conform to" any "unjustly discrimiatory or unfair" practices of the voting members of the Conference.

After reviewing the arguments and the legislative and administrative histories of Section 810 of the Act, I am constrained to hold, for the reasons stated below, that Section 810 of the Act (1) applies to the foreign-to-foreign segments of trade routes found essential to the foreign com-

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American President Lines, Ltd., Japan/Saigon Freight Conference, Dated July 15, 1965

merce of the United States, and (2) is violated by mere membership of an American line in a conference that excludes other American-flag operators.

APL argues that Congress intended Section 810 of the Act to apply only to United States-to-foreign trade. The text of Section 810 of the Act does not delimit the trades to which it applies. It refers to ". . . *any contractor* . . ." receiving operating-differential subsidy that continues to be a party to or conforms to ". . . any agreement with another carrier or carriers by water . . ." or engages in ". . . *any practice* in concert with . . ." such other carriers " . . . which is unjustly discriminatory or unfair . . ." to any citizen employing American-flag vessels on an essential United States trade route (emphasis supplied). There thus is no explicit textual support for the position of APL, although the language could support that interpretation if there were other reasons to so read it. Since this matter is one of statutory interpretation, recourse to the legislative history is necessary to determine Congressional intent.

APL contends that since abuses within a conference engaged in United States-to-foreign trade prompted adoption of the section, it is limited in application only to such trades (Petition for Declaratory Order, pp. 10-11). At the time Congress was considering the bill which was soon to become the Merchant Marine Act, 1936, there was in operation the South African Conference composed of six foreign lines and one subsidized American operator. On several occasions the Robin Line, an unsubsidized American-flag operator in competition with conference members between New York and South Africa, applied for and was denied membership. The purpose of the conference was two-fold: (1) to

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American President Lines, Ltd., Japan/Saigon Freight Conference, Dated July 15, 1965

impede entry into the trade by non-conference American operators; and (2) to divert South African trade from the port of New York to various Canadian ports. (Hearings on S. 3500, S. 4110 and S. 4111, Senate Commerce Committee, 74th Cong., 2d Sess., pp. 183-85 (1936); 80 Cong. Rec. 9921-22 (1936)).

During the debate on H.R. 8555 (forerunner of the 1936 Act), Senator O'Mahoney cited the South African Conference and asked Senator Copeland, sponsor of the bill, whether or not there was any provision therein that would prevent American subsidized lines from participating in such exclusionary practices against other American operators (80 Cong. Rec. 9921 (1936)). Senator Copeland replied that he did not approve of such discriminatory practices, but felt the Shipping Act, 1916 [Section 15], afforded sufficient protection in that the then United States Shipping Board had the power to approve, disapprove, or modify any (including a conference) agreement if it finds such agreement to be ". . . unjustly discriminatory or unfair . . ." (80 Cong. Rec. 9922 (1936)).

Actually, the Shipping Act, 1916, contained several interlocking sections bearing on the problem being discussed. Section 14 prohibited common carriers by water between United States and foreign ports from engaging in certain enumerated practices, e.g., deferred rebates and the use of "fighting ships". "Dual rate contract arrangements" approved by the appropriate regulatory body pursuant to Section 15 of the 1916 Act were exempted. Section 15 of the 1916 Act imposed restrictions upon American-flag operators in the foreign commerce of the United States by providing for approval, modification and disapproval of

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American President Lines, Ltd., Japan/Saigon Freight Conference, Dated July 15, 1965

any agreements they might enter into, including conference agreements. Further, Section 14a of the 1916 Act (added in 1920) directed the Secretary of Commerce to deny any foreign operator entry into United States ports if such operator is in violation of Section 14 or is a party to any combination, agreement or understanding affecting transportation of person or property *between foreign ports* which involves deferred rebates or any other unfair practice specified in Section 14 *and* denies membership upon equal terms to an American-flag operator.

Senator Copeland was forced to concede that the practices alluded to by Senator O'Mahoney were still taking place despite the existence of the above-mentioned laws. As an indication that additional legislation was felt necessary to circumscribe a *subsidized* operator's conference activities, floor discussion ended with this exchange between the two senators:

> "Mr. O'Mahoney: Would it not be a simple matter to *provide an amendment that no subsidy of any kind or character shall be paid to any shipping line or shipping concern which has entered into an arrangement to destroy any other American Line?*"
>
> "Mr. Copeland: Let us find out. I will consult the experts and see if they can choose language to cover what the Senator has in mind." (80 Cong. Rec. 9922 (1936), emphasis supplied)

Senator O'Mahoney's solution to this problem was the amendment which became Section 810 of the Act. In his introductory comments, Senator O'Mahoney expressed dissatisfaction with the lax enforcement of the existing laws

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regulating conferences *and specifically quoted Section 14a of the 1916 Act which related to foreign-to-foreign conferences.* He then stated in unequivocal terms:

> "It is my purpose in presenting this amendment [Section 810 of the Act] to make it clear to the Maritime Commission that it is the *intention of Congress not to pay subsidies of any kind to any American line which is willing to enter into any combination with other lines, including those operating under foreign flags, to crush American competition.*" (80 Cong. Rec. 10075-76 (1936), emphasis supplied)

Neither the policy underlying Section 810 of the Act nor the language used by Senator O'Mahoney indicates that any distinction should be drawn between United States-to-foreign and foreign-to-foreign segments of an essential route in United States commerce.

> "It is represented, on apparently good authority, that American citizens . . . *have applied for admission to conferences of which foreign lines are members, and have been denied that admission.* Without the amendment which is proposed [Section 810 of the Act], therefore, we should have the anomalous condition that the United States would be in the position of paying a subsidy to an American line *which was in truth and in fact engaged in a conspiracy with foreign lines to discriminate against another American line.* This amendment will, I think, obviate that very *unwise and improper and unjustifiable* condition."

. . . . .

EXHIBIT C—Annexed to Foregoing Affidavit

American President Lines, Ltd., Japan/Saigon Freight Conference, Dated July 15, 1965

> "I am told that the Shipping Board in the past has not enforced the law [Section 14a of the 1916 Act] which so clearly provides that American lines, on application, are entitled to admission to any conference. *A closed combination of this kind is indefensible, and surely should not be supported by the Treasury of the United States.*" (Ibid., emphasis supplied)

Futhermore, the Federal Maritime Board ("FMB") has uttered strong dicta to the effect that Section 810 of the Act governs foreign-to-foreign trade (Isbrandtsen Co., Inc. v. American Export Lines, Inc., 4 FMB 442 (1954)). In that case Isbrandtsen alleged that American Export violated Section 810 of the Act and certain articles of the subsidy contract by entering into freight agreements for exclusive carriage of cotton from Egypt to India and Pakistan. The proceeding was discontinued but in so ordering the FMB found opportunity to discuss the legislative intent in Section 810 of the Act, as reflected in the two quotations from the Congressional Record given immediately above. It concluded that the unjust discrimination noted was the exclusion of "a United States-flag line from a conference *operating between foreign parts. . . .*" (Id. at 453, emphasis supplied). Opened for reargument and reconsideration, the proceeding was discontinued again and Isbrandtsen's complaint dismissed but not before the FMB noted:

> ". . . [A]s discussed in our earlier report, the prohibition of Section 810 is aimed at preventing the exclusion of American-flag carriers from participation in *conferences or agreements among carriers operating between foreign ports.*" (Isbrandtsen Co., Inc. v. American Export Lines, Inc., 4 FMB 772, 784 (1956)) (Emphasis supplied)

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In extending operating-differential subsidy, Congress intended to strengthen the American Merchant Marine by making it competitive with foreign lines. It seemed inconsistent with this objective to subsidize an operator, which, in collusion with foreign lines, discriminates against another American-flag operator. In fact, the subsidized American operators of today, including APL, are contractually bound to cooperate with and show favoritism to other American operators, rather than foreign persons or entities, with the objective of developing the American Merchant Marine (Article II-3, Operating-Differential Subsidy Contract Standard Part II, filed in the Office of the Secretary, Maritime Administration, Washington, D.C.).

Moreover, it would appear senseless to permit discriminatory practices on one segment of an essential trade route and condemn them on another segment which happens to lie between the United States and first or last foreign port of call. This conclusion is buttressed by Section 14a, Shipping Act, 1916, noted above, which provides for the closing of United States ports to foreign operators who enter in combinations affecting trade between foreign ports which result in unfair, discriminatory practices, and who deny Americans equal standing under such agreements. It would be incongruous to suppose Congress would visit such a severe penalty on foreign members of a conference discriminating against American-flag operators in foreign-to-foreign trade and allow a subsidized American operator to participate in the same conference with impunity. If anything is to be expected, it is that American subsidized operators owe a special obligation to refrain from discrimination against other American operators. The operating subsidy contract, Article II-3, noted above, contractually binds the operator to this expectation.

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APL also argues that the limited territorial scope of Section 15, Shipping Act, 1916 attached to Section 810 of the Act (Petition for Declaratory Order, pp. 11-12; Reply Memorandum, pp. 5-6).

There is no doubt that the United States can regulate and exert jurisdiction over its citizens anywhere in the world (Blackner v. United States, 284 U.S. 421 (1932)). It is on this principle that the Congress can impose conditions upon any American-flag operator roving the world's sea lanes.

Thus, the *power* of Congress to regulate is in no sense limited by any requirement that the conferences regulated involve an American port. APL urges that Congress *intended* to so limit Section 810 of the Act and refers to the attempted repeal in 1938. The proponents of repealer claimed that the section was redundant because Section 15 of the 1916 Act was adequate to curb the abuses which had prompted the former's enactment. In other words, the two statutes were co-extensive. While no final conclusions can be drawn from Congress' failure to repeal the statute, it is some indication that Congress did recognize a difference in the territorial applicability of each.

APL also argues that even if Section 810 of the Act can be construed as applying to foreign-to-foreign trade conferences it should be so read, in the absence of clear legislative intent, when the result is to place American operators at a severe disadvantage in trades unrelated to the commerce of the United States (Petition for Declaratory Order, pp. 8-9); further, that to force withdrawal of an American-flag line from a foreign conference will diminish the effec-

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tiveness of the American Merchant Marine and remove the possibility that such a member operator could influence the acceptance of other American-flag lines (Id. at pp. 9 and 16).

The first argument begs the question, for clearly the trade covered by the Conference Agreement is related to the commerce of the United States. When shippers agree to use certain preferred carriers for the movement of cargo between given points, the amount available to American-flag vessels is necessarily curtailed. In addition, the subject segment was determined to be essential to the foreign commerce of the United States, pursuant to Section 211(a) of the Act, else APL would not be eligible for the subsidy it claims for the time spent at, and passing between, the two points.

The charge that the forced withdrawal of APL from the Conference will result in a "disadvantage to" and "diminution of American Merchant Marine effectiveness" is simply answered: the Congress was aware of these possibilities at the times of enactment (80 Cong. Rec. 10076 (1936)) and attempted repeal (Hearings on H.R. 8532, House Merchant Marine and Fisheries Committee, 75th Cong., 2d Sess., pp. 13-14 (1938)). Nevertheless, the section was passed and has been retained.

APL claims that it has actively sought membership for other American-flag operators and that it expressly rejected, as a condition of membership, the obligation of voting to exclude other American operators (Petition for Declaratory Order, p. 15; Reply Memorandum, p. 11). However laudable such gestures might be, the primary purpose of Section 810 was to deny the financial support of the United States

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Treasury to any American operator that was willing to be a party to any combination effectively causing detriment to other American operators (80 Cong. Rec. 10075-76 (1936)). This statement of the basic purpose of Section 810 of the Act also serves as reply to the sugestion offered by APL that the Maritime Administration should ignore its responsibilities under Section 810 because of the disinclination of four other American operators in a position to serve the trade to complain of continued APL membership in the Conference (Letter of Late-filed Advice, February 8, 1965). The concluding paragraph of Section 810 of the Act, not recited heretofore, describes the possible penalties for violation of the first part:

> "No payment or subsidy of any kind shall be paid directly or indirectly out of funds of the United States or any agency of the United States to any contractor or charterer who shall violate this section. Any person who shall be injured in his business or property by reason of anything forbidden by this section may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

The Maritime Administration is obliged to stop subsidy payments to violators of this section. Separate and distinct from this is the remedy of a private party. The expression of four other operators, to the effect that they don't care whether APL continues its Conference membership, addresses itself only to this private remedy. It merely means that some potential suitors are disinclined to sue

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APL. This has no effect whatsoever on the Maritime Administration's *obligation to cease subsidy payments to a violator.*

As to the second main issue, *APL contends* that it has not, nor could it have, engaged in conduct prohibited by Section 810 of the Act. Refining this contention, it is argued that (1) the Agreement is not *of itself* unjustly discriminatory or unfair to other American-flag lines, (2) *APL is a non-voting, associate member of the Conference and, therefore,* (3) *being a limited party to the Agreement, APL is not a party to nor does it conform to any practices of the other Conference members which are "probably 'unjustly discriminatory and unfair', under the standards of the United States statute" (Petition for Declaratory Order, pp. 14-15).*

The importance of reading this language in accord with its plain meaning is emphasized by the penal character of Section 810 of the Act, which begins, "It shall be unlawful. . . ." This phrase immediately brings into play Section 806(b) of the Act which reads, in pertinent part:

> "Whenever any corporation is found guilty of any act or acts declared in this Act to be unlawful, such corporation shall be punished by a fine of not more than $25,000."

A substantial ground for rejecting this contention is found in the very language of the Act, Section 810, which reads, in pertinent part:

> *"It shall be unlawful for any contractor receiving an operating-differential subsidy under Title VI . . . to continue as a party to or to conform to any agree-*

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> *ment* . . ., or to engage in any practice in concert . . ., which is unjustly discriminatory or unfair to any other citizen of the United States. . . ." (emphasis supplied)

This language, furthermore, is reflected in each operating-differential subsidy agreement thus making the grant of subsidy conditional upon the operator not continuing to be a party to or conforming to any agreement which is unjustly discriminatory or unfair to any other American citizen (Article II-18(b), Operating-Differential Subsidy Contract Standard Part II, filed in the Office of the Secretary, Maritime Administration, Washington, D.C.).

While APL has no voting rights, it has admitted being a party to and conforming to the Conference Agreement (Reply Memorandum, p. 11). The statute makes no mention of voting, nor does it divide membership into types and classes. Further, APL has availed itself of the benefits of the rules and regulations promulgated by the voting members of the Conference and agreed to be bound by those rules and regulations under penalty of fine.[1] *APL may*

---

[1] Selected passages from the Conference Agreement and Addenda:

> "Japan/Saigon Freight Conference—Agreement . . . 1. a. The Lines agree to charge strictly the applicable rates of freight in the Conference Tariff and amendments thereto and to adhere to all the other conditions stated therein; they also undertake to observe such regulations and/or amendments as may be agreed upon from time to time."
>
> * * * * *
>
> "c. The Lines agree that they will insure that their offices, agents, sub-agents and all other connections in any

EXHIBIT C—Annexed to Foregoing Affidavit

American President Lines, Ltd., Japan/Saigon Freight Conference, Dated July 15, 1965

not ignore the plain language and intent of the section by declining the vote and letting the other members pursue their discriminatory practices. Clearly then, APL's continued membership would do violence to Section 810 of the Act.

In view of the foregoing, I conclude that Section 810 of the Act applies to the Japan/Saigon Freight Conference for the reason that American-flag operators, which act as common carriers and exclusively employ vessels under United States registry on an established trade route from and to

---

way with their business in Japan or Saigon or elsewhere adhere strictly to this agreement."

* * * * *

"3. . . . If it is decided by a two-thirds majority vote of the Members that a breach of this Agreement has been committed, . . . [and if] the Member so charged fails to submit an explanation satisfactory to a two-thirds majority of the Members . . . then the offending Member shall pay to the Conference Secretaries a sum amounting to five times the amount of the freight involved subject to a maximum of HK $5,000. — or its equivalent."

(A second breach within six months makes the offender liable to a fine of HK $30,000. — or its equivalent).

* * * * *

"9. . . . . The Lines agree to observe faithfully both the letter and the spirit of this Agreement."

"10. . . . It is also agreed that decisions as to admission of new members shall be determined by three-fourths majority of all Members entitled to vote."

"Japan/Saigon Freight Conference Agreement Addendum No. 3"

* * * * *

"3. American President Lines, Ltd. agree to and shall strictly observe the regulations of the Conference Agreement and addenda thereto."

EXHIBIT C—Annexed to Foregoing Affidavit

American President Lines, Ltd., Japan/Saigon Freight Conference, Dated July 15, 1965

a United States port or ports, have been denied membership in that Conference. *Consequently, APL's continued membership in the Japan/Saigon Freight Conference would be in violation of Section 810 of the Act and subject it to the severe penalties prescribed by Congress, most prominently, the loss of subsidy.*

Accordingly, the order to withdraw, dated May 28, 1964 and stayed on July 2, 1964, is hereby reinstated effective the date this decision is served upon the petitioner.

NOTE:

The letter of May 28, 1964, ordering APL to withdraw from the Conference was, as stated in Docket No. A-17, "stayed on July 2, 1964".

The Administrator's decision in Docket No. A-17 reinstates the order of May 28, 1964, upon service and receipt of his decision.

The Order of May 28, 1964, thereby reinstated, is quoted in pertinent part, as follows:

> "You are hereby directed immediately to take such action as is required by the terms of the Japan/Saigon Freight Conference to withdraw from said agreement.
>
> "Please furnish this Office with a copy of such correspondence as may be exchanged with the conference concerning your withdrawal and advise this Office when your withdrawal becomes effective."
>
> James S. Dawson, Jr.
> Secretary
> Maritime Administration

July 15, 1965

EXHIBIT 4

Motion 33389, April 27, 1973

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 33389/90/91

MARSHALL P. SAFIR,

Appellant,

—against—

GIBSON-STANS, et al.,

Appellees.

In accordance with rule 27(B) of the Federal Rules of Appellate Procedure and on the Affidavit, Brief and Exhibits herein submitted appellant moves this Court (Judges Friendly, Kaufman and Waterman) reverse and set aside all of Conclusions #2-A thru F (pp. 69 & 70) of the MA/MSB decision and order in its Docket S-243 and remand same with directions to:

1.) Recover *all* operating differential subsidies, as defined in the ODS agreements with the carriers, under Title VI of the Merchant Marine Act of 1936 paid to the violators of Sec. 810 thereof and allocable to the 11 month period of violation without restriction to the types of vessels, trade routes, ports, directions of carriage, or vessel to vessel departure dates.

2.) Stay the agencies attempt to waiver all other subsidy recovery as may be required under Title V and Title VII of the act as well as other types of subsidy both direct and indirect referred to in said order in S-243 pending the

threshhold recovery of all the ODS payments made during the 11 month period.

3.) And for such other relief as this court may deem appropriate.

Respectfully submitted,

/s/ MARSHALL P. SAFIR Pro Se
MARSHALL P. SAFIR.

ROBERT J. DANNENHOFFER
Notary Public, State of New York
No. 52-5916586
Qualified in Suffolk County
Commission Expires March 30, 1974

EXHIBIT 5

U. S. DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION
Washington, D.C. 20235

May 20, 1970

Allan I. Mendelsohn, Esq.
Glassie, Pewett, Beebe & Shanks
Federal Bar Building West
1819 H Street, N. W.
Washington, D. C. 20006

Dear Mr. Mendelsohn:

Reference is made to your letter of May 4, 1970, requesting certain information respecting subsidy payments during the period March 30, 1965 through February 28, 1966, made to nine (9) specified shipping companies.

Please find attached (Attachment I) which furnishes the information requested in sub-paragraph (1) of your letter and Attachment II, which is responsive to sub-paragraph (2) of your letter.

In keeping with established User Fees, you are respectfully requested to submit a check in the amount of $50.00, made payable to "Maritime Adm.-Commerce", to the undersigned to compensate for time spent in compiling the attached tabulations.

Sincerely,

JAMES S. DAWSON, JR.
Secretary

Attachments

Attachment I

DEPARTMENT OF COMMERCE—MARITIME ADMINISTRATION
CASH SUBSIDY PAYMENTS MADE TO SELECTED SHIPPING COMPANIES
IN THE PERIOD MARCH 30, 1965 THROUGH FEBRUARY 28, 1966

Name of Company	*Operating-Differential Subsidies*	*Construction-Differential Subsidies*	*Total Subsidies Paid*
American Export Isbrandtsen Lines, Inc.	$ 29,044,028.74	$ 344,685.73	$ 29,388,714.47
American President Lines, Ltd.	25,281.292.09	14,764,741.49	40,046,033.58
Bloomfield Steamship Company	1,384,187.53	—0—	1,384,187.53
Farrell Lines Incorporated	6,428,221.13	—0—	6,428,221.13
Grace Line, Inc.	17,213,156.03	20,120,297.83	37,333,453.86
Lykes Bros. Steamship Co., Inc.	20,017,353.25	25,702,958.78	45,720,312.03
Moore-McCormack Lines, Inc.	21,236,087.68	1,616,758.09	22,852,845.77
Prudential Lines, Inc.	2,161,538.61	7,533,671.67	9,695,210.28
United States Lines, Inc.	26,844,437.62	7,992,953.06	34,837,390.68
Totals	$149,610,302.68	$78,076,066.65	$227,686,369.33

EXHIBIT 5

Attachment II

STATEMENT SHOWING THE ESTIMATED AMOUNTS OF OPERATING-DIFFERENTIAL SUBSIDY AND CONSTRUCTION-DIFFERENTIAL SUBSIDY ACCRUED AND PAID TO THE SUBSIDIZED OPERATIONS LISTED BELOW DURING THE PERIOD MARCH 30, 1965 TO FEBRUARY 28, 1966

	ODS Subsidy		*CDS Subsidy*	
Subsidized Operator	*Amount Accrued*	*Amount Paid*	*Amount Accrued*	*Amount Paid*
		(1)		(2)
American Export Isbrandtsen Lines, Inc.	$ 22,818,606	$20,828,845	$21,030,000	$ —
American President Lines, Ltd.	19,552,915	17,846,359	6,932,730	1,211,364
Bloomfield Steamship Company	775,157	699,071	—	—
Farrell Lines Incorporated	4,491,533	4,087,785	—	—
Grace Line, Inc.	11,599,660	10,611,741	—	—
Lykes Bros. Steamship Co., Inc.	13,306,076	12,196,526	—	—
Moore-McCormack Lines, Inc.	14,389,300	13,145,079	—	—
Prudential Lines, Inc.	1,771,554	1,612,898	—	—
United States Lines, Inc.	20,340,864	18,636,366	—	—
Totals	$109,045,665	$99,664,670	$27,962,730	$1,211,364

Notes:

(1) The estimated ODS accrual and payment figures represent the amounts applicable only to the period March 30, 1965 through February 28, 1966. These amounts the subject to adjustment after audit of domestic costs, the application of final rates thereto, and the audit and approval of final accountings for the period involved.

(2) The estimated CDS accrual and payment figures represent the amounts applicable only to CDS contracts awarded during the period March 30, 1965 through February 28, 1966. These amounts are subject to adjustment for changes and extras and final contract audit.

Prepared by
Division of Subsidy Contracts
Office of Government Aid
Date May 7, 1970

EXHIBIT 6

Affidavit of Marshall P. Safir and Brief

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 72-1753

MARSHALL P. SAFIR,

Appellant,

—against—

ROBERT J. BLACKWELL, Maritime Administrator, Maritime Administration, U. S. Department of Commerce, et al.,

Appellees.

State of New York)
County of Kings) ss:

MARSHALL P. SAFIR, being duly sworn, deposes and says:

It has been more than two years since this court's last decision in Safir v. Gibson (432 F.2d 137 (2d Cir. 1970) with supplement June 18, 1970, was a sequel to (417 F.2d 972 (Cir. 1969.))

Both of these decisions set the course for the investigation and fact finding to follow through the administrative procedures of government prior to further judicial review by this court. This hearing is known as Docket No. S-243 before the Maritime Subsidy Board of the Department of Commerce.

The Maritime Subsidy Board through its chief hearing examiner has finally rendered an initial decision dated April 24, 1972 in which the examiner affirms the common carrier status of Sapphire Steamship Lines during the

period in question and thereby validates the last remaining criterion for a violation of section 810 of the Merchant Marine Act 1936 as defined by this court.

This appellant has been actively concerned that the public officials who were originally unwilling to take any action on this claim that subsidies be recovered, were not taking proper safeguards to protect the interest of the United States and his own in later action under 31 U.S.C. Sec. 231, 232, 233 & 235 after extent of these recoveries are decided upon.

As a close observer of the financial condition of American Flag Shiplines over many year, appellant has knowledge of the present precarious financial condition of some of these violators—specifically American Export Lines, United States Lines and Prudential Grace Lines, even if his instant claim did not exist. Moore McCormack postulates to financial soundness but would not be sufficiently credit-worthy for the subsidy refund potentially due here at double damages without precautionary measures being taken by a prospective judgment creditor.

Accordingly, in June 1971 this appellant moved for an order before Judge Dooling which was granted on June 22, 1971 and later amended July 26, 1971 herein Exh. 7. It is interesting to note that Judge Dooling was persuaded to issue it when it became apparent that payments of these old claims were being expedited by the Maritime administration before its duty to this appellant under Safir v. Gibson, supra, p. 3511 Exh. 8 to decide whether to recover subsidies. By the time this injunction issued, almost $36,000,000.00 of the total of $36,849,478.06 had been paid out to the violators for claims which have now been proven fraudulent.

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Affidavit of Marshall P. Safir and Brief

Although Judge Dooling's order was narrow in respect that only those funds which applied to the eleven month period were subject to it, the decision was significant. It served to confirm that on prima facie evidence of violation alone, injunctive relief was available prior to judgment in certain circumstances. While this appellant might not be entitled to infer that "every other asset and every other pending receipt of any of the Steamship Co.'s would with equal plausibility be subjected to a demand that it be placed in escrow or otherwise set aside for execution in the event that large recoveries were ordered by the subsidy board" (see Pg. 5, Exh. 9) at *that* time;—after the initial decision of the chief hearing examiner (Ex. 1) effectively finding that the last remaining criteria for the establishment of sec. 810 violation had been met. Safir v. Gibson, supra 1970, Ex. 10). This appeallant was *now* entitled to protect his interest against continuing slack enforcement of the statute 46 U.S.C. 1227 sec. 810. (See Exh. 11 N.Y. Times August 8, 1972.)

On information that various passenger ships owned by the violators and built with 50% construction differential subsidy funds were authorized for sale to foreign interests by the congress (see Exh. 12) and that the s.s. United States would be sold to the government with unlimited use of the net proceeds thereof for 12 months, and in light of statements by financial officers of the violating carriers to their potential insolvency, (see exh. 13) appellant sought injunctive relief by a government escrow of the net proceeds of these sales pending determination of the amount of subsidy refund due.

The amount of subsidy refund potentially recoverable for the period in question at single damages may approximate $500,000,000.00. At present $1,000,000.00 is being

withheld against this liability while the Maritime Subsidy Board continues its procrastination (see exh. 6 & 6A), with the same zeal that it expedited the payment of almost $80 million false past subsidy claims in total last year (see pg. 2, exh. L4.)

Judge Dooling, upon evidence no longer prima facie, but on a hard finding of fact, finds no cause for alarm and feels himself comfortable under a coverlet of outdated balance sheets; hence this appeal.

STATEMENTS OF ISSUES

There are two issues presented for review to this court:

(1) Does appellant Marshall P. Safir have a statutory interest under 31 U.S.C. Sec. 231-233, 235 in any forfeiture mandated by the violation of 46 U.S.C. 1227 Sec. 810 by the offending ocean carriers as Sec. 819 has been interpreted by *this* court's decisions in *Safir* v. *Gibson, supra,* 1969 and this court's decision and supprementary denial of respondents motion for hearing en banc *supra* 1970.

(2) Does the finding of fact by the chief hearing examiner that *this court's* last remaining criteria for a violation of Sec. 810 has been met finally give their appellant the right to demand that ship and other asset sales by the violators be placed in escrow or otherwise set aside for execution pending review by this court of the government's decision whether to recover subsidies due and if so how much and from whom.

Appellant believes Judge Dooling to be in error when he stated in his order that no statute authorizing a *qui tam* recovery had been pointed to. On page 27 line 22 of the transcript May 31, 1972, the False Claims Act was pointed

to specifically by Mr. Salzman. At the same time Mr. Salzman was kind enough to mention the landmark decision regarding *qui tam* actions *United States ex rel Marcus* v. *Hess* (317 U.S. at 537-561), even though Judge Dooling is technically correct in that appellant did not cite 31 U.S.C. 231-233, 235 as representing the newer statutory listing updated with supplements.

It is most helpful to a citizen acting pro se to find so topical a reference as *Connecticut Action Now Inc.* v. *Roberts Plating Co., Inc.* in which this court has now carefully circumscribed the qualifications for standing to sue for civil penalties under 31 U.S.C. 232. The classic definition of standing to pursue a violation of Sec. 819 as defined in *Safir* v. *Gibson* 1970 *supra* p. 1701 is fully matched and met by this appellant in outline and contour in regard to standing under 21 U.S.C. 231-233, 235. The best evidence of the classic *qui tam* nature of this appellant's quest is summed up on p .20 of exh. 4 wherein the Public Counsel Michael J. McMorrow, consistently backing his proposed findings and brief (exh. 15 & 15A) states, "in the present case, and notwithstanding the inclusion of the requirements of Sec. 810 of the act in each and every subsidy agreement, the respondents did not request contractual permission but proceeded to effect rate reductions and to wage battle before the F.M.C. *once the board was involved, and only through the behest of Mr. Safir,* the respondents firmly deny to this date that rate actions are subject to the section. The distinctions are all too apparent. What remains is a clear provision of the subsidy contract and an explicit statute both binding on the respondents as of *the day they first began, without any overture to the Maritime Administration, the unlawful behaviour.*"

The deceit is obvious. The respondents unlawful behaviour during that period violated both a clear provision

in the subsidy agreement as well as an explicit statute and in presenting their claims for subsidy payments corresponding to that period the respondents received government monies to which they were not entitled. Moreover, in presenting the claims, the respondents were holding out that the provision of Sec. 810 which are incorporated in the subsidy agreement had been complied with, in effect misrepresenting their compliance with its terms. Appellant in fact far exceeds the requirements of the doctrine in *Marcus* and fortuitously escapes every disqualification inherent in the infirmity of the environmental group bringing the action in *Roberts Plating, supra* to justify his *qui tam* interest.

Beyond the affirmative configuration of standing in *Marcus* and meeting the limitations imposed in *Roberts* is the fact that *this appellant is just as much a victim of false claims as the Government with which he seeks to share the potential recovery.*

The subsidy claims paid to the respondents were used to finance their very predatory activities against this appellant's company. As stated by this Court on p. 3508 in *Safir* v. *Gibson,* 1969,

> "The legislative history demonstrates that termination of subsidies was not designed to be a purely penal measure, although quite likely the punitive effect was considered a desirable by-product. *The primary concern manifested was with the added burden which subsidies impose on the competitive position of the victim.*
>
> "We think this concern also extends to the interest of a former victim in the recovery of subsidies improperly paid in the past to lines which are still his competitors, although here the duly of the admin-

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Affidavit of Marshall P. Safir and Brief

> istrator may be less absolute than in the obligation to cease payments to current violators. In the nature of things, few complaints of violations will be received and acted on until after some further payments have already been made. *Recovery of such payments imposes an added cost on the violators and thus will partially make up to the victim for the burden which the earlier payments indirectly imposed on him.*"

Moreover, despite notice to the proper governmental agencies (Maritime Administration, and by them the Dept. of Justice), it is only through the single handed efforts of this appellant that the Government has the opportunity to recover the monies which the respondents wrongfully procured from the public fisc. As stated in *United States* v. *Griswold,* 24 F. 366:

> "Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow going public vessel."

This Court, through a footnote #8 in *Safir* v. *Gibson,* 1969, *supra* stated "the grant to private citizens of a remedy that would not exist in the absence of specific authorization in no way precluded the availability of further relief consistent with the statutory scheme." It is indeed reassuring to this appellant to know the broad legal base on which he stands. However, the availability of the specific authorization afforded by 31 U.S.C. 232 should be enough by itself for his re-entry into the Maritime Industry consistent with the statutory scheme.

The appellant is prepared to invest his share of the recovery back into the American Merchant Marine in order that such recovery might not "fatally interfere with the general policy of the act to foster the development of the

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American Merchant Marine." (*Safir* v. *Gibson, supra,* pp. 3506-7 & 9.)

Appllant does *not* intend to "take the money and run."

WHEREFORE, appellant prays that this Court reverse the instant order by directing that the injunction issue and instruct all concerned that this appellant does have a *qui tam* interest as set forth in 31 U.S.C. 231, 232, 233, 235 in any recovery mandated for the violation of 46 U.S.C. 1227, Sec. 810, and for such other relief as this Court may direct.

Respectfully submitted,

s/s MARSHALL P. SAFIR

MARSHALL P. SAFIR
Pro Se

August 21, 1972

State of New York
County of Kings

ROBERT J. DANNENHOFFER
Notary Public, State of New York
No. 52-5916586
Qualified in Suffolk County
Commission Expires March 30, 1974

EXHIBIT 7

Reply Brief of Marshall P. Safir, Dated Oct. 4, 1972

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 72-1753

MARSHALL P. SAFIR,

Appellant,

—against—

ROBERT J. BLACKWELL, Maritime Administrator, Maritime Administration, U. S. Department of Commerce, et al.,

Appellees.

REPLY BRIEF OF MARSHALL P. SAFIR, Pro Se

October 4, 1972

The government's brief, in giving the background of the case, completely omits any mention of this court's per curiam decision in Docket #34355 on June 18, 1970. In denying the petition by the instant appellees and others, this court affirmed the collateral estoppel effect on MARAD of the decision in Docket #65-13 by the Federal Maritime Commission (see Exh. A).

This per curiam decision buttresses most of the elements required for injunctive relief, and when taken together with the exhibits attached hereto, should be conclusive in the reversal of Judge Dooling's decision.

In its mention of the "wearisome course the government has plotted" (Exhibit A, p. 20a), this court recognized the effect of administrative attrition and delay on this appellant in his desire to return to the shipping business. Appellant

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Reply Brief of Marshall P. Safir, Dated Oct. 4, 1972

is now 53 years of age. It has been seven years since he was victimized by the predatory tactics of these steamship lines and the other members of AGAFBO and had been denied re-entry to the shipping industry. Two and one-half years had already elapsed by 1970, as recognized by Judges Lumbard, Friendly and Feinberg when they made their decision. Now, more than two years and three months after that favorable decision, the appellant is still denied the relief this court held out in its original decision (1969, 417 F.2d 972) by Judges Friendly, Waterman and Kaufman.

The irreparable loss of these years of prime time in the appellant's life is the injury for which there are no sufficient monetary damages, and the loss is ongoing. Brandeisian concepts of free entry and re-entry require time and patience, but immortality, while helpful was not considered a prerequisite to the attainment of these objectives.

Appellees argue that appellant has failed to make clear showing of probable success on the merits of the underlying case, but in the decision of June 18, 1970 (Exhibit A), this court stated that "we are clear that the legal issue must be decided in their favor," since it had been fully litigated before the FMC. A violation of Section 15 of the shipping act of 1916 was a violation of Sec. 810 subject only to proof of common carrier status of the Sapphire SS Lines at the time the violation took place. This proof is now in App. Exhibit 1, page 3. There is no longer any question of "probable" success in the underlying case. The only questions left are:

1) How much should be recovered from the violators individually and/or collectively?

2) Does this recovery by the United States Treasury include payments to the appellant of up to 25% of these funds as set forth in 31 U.S.C. 232?

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The U. S. Attorney argues that the affidavit of Ar
Silverman shows that the defendant's steamship compan
are:

1) *financially responsible*, and

2) that the government has already, by means of certa
security, exacted from some of the lines "*more tha
adequately assured recovery of any sums due.*"

While, as will be shown, Mr. Silverman's affidavit is wo
fully lacking in current financial information, the U. S
Attorney is also "wildly presumptuous" in attributing eithe
of these statements to Mr. Silverman.

The unsigned answering brief of Kirlin, Campbell and
Keating - Elmer C. Maddy of Counsel, has on page seve
thereof challenged appellant to introduce evidence to con
trovert MARAD's records on U. S. Lines' net worth.

1) The Silverman affidavit states that the net worth o
U. S. Lines as of 12/31/71 is 74.1 million. Appellant
herewith submits as Exhibit B financial statement of
U. S. Lines prepared by Price, Waterhouse as of
12/31/71 showing a net worth of 62.6 million (see
fold-out sheet). Further, page 3 shows a 1971 op
erating loss of 9.2 million.

2) In another matter before the Federal Maritime Com
mission, Counsel for U. S. Lines and its parent
Walter Kidde & Co., Inc. as recently as 7/26/72
openly *confessed* that "U. S. Lines' financial *in
stability* is basic." (See Page 7, Exhibit C.)

The Silverman affidavit also sets forth as a "current"
figure the 1970 net worth of American Export Lines at
96.2 million. Appellant submits (as Exhibit D) an article
in the Wall Street Journal showing a net loss in its con

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glomerated parent of 32.4 million in 1971 and expressing the relief of its Chief Executive Officer at the temporary reprieve from acceleration of loan obligations in default.

The financial instability of this violator of 46 U.S.C. 1271 is sadly all too apparent. Judge Dooling's confidence in this company was misplaced.

Counsel for U. S. Lines makes much of the unique, non-discretionary, ministerial function of the Secretary of Commerce in being directed by law to purchase the SS United States and cites on Page 13 of his brief that any impairment, even temporarily, of the mandated plan embodied in P.L. 92-296 will adversely affect the public interest.

It is indeed ironic that on September 21, 1972, the President of the United States in a letter to the National Maritime Union states as follows:

> "The legislation authorizing the Federal Government to acquire the SS UNITED STATES cannot be acted upon until separate legislation is passed to appropriate the necessary funds. At present, there are no funds provided in the Fiscal Year 1973 or the Fiscal Year 1974 budget for this purpose.
>
> "Your suggestions for possible government employment of the vessel will be given careful consideration should the government acquire title. The National Defense Reserve Fleet must also be considered as a possibility in this regard, but only after other alternatives have been exhausted."

The letter (Exhibit E) is enclosed.

The President does not feel that the public interest will be adversely affected by withholding the consummation of

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this sale, or the escrow of its proceeds. Indeed he wishes to exhaust all alternatives before any sale takes place.

Counsel for American Export Lines fearfully states in his brief on Page 11 "that any escrow of the net proceeds of sale until the completion of the litigation before the Maritime Subsidy Board would defer the commitment of those funds to construction of new vessels *indefinitely*."

He confidently feels that the "wearisome course that the Government has plotted" in this case is far from over, but would in no way want his client to be injured by the type of treatment which up to now has been reserved for the appellant alone. The injunction, if for this reason alone, would be poetically just.

Counsel for Prudential-Grace Lines takes great comfort that the Chief Hearing Examiner found no violation of Sec. 810 in his client's case but this decision applied only to the overt rate issue. Appellant sees no reason for the *unconcern* felt by this carrier. Judge Dooling cautioned him in the May 31, 1972 court hearing that his exculpation was only provisional and subject to review (Page 40 of the transcript, also see Exhibit A, p. 21a).

Certainly until the MSB makes its decision in the light of its precedent in Docket A 17 (see Appendix Exhibit II, p. 3 et seq.), and this decision is reviewed by this Court, Counsel's desire to bask in the warmth of his exoneration should be no more reassuring to him than Mr. Silverman's outdated figures on the financial stability of United States Lines and American Export Lines should be to the United States and this appellant.

Finally, appellees sedulously maintain that appellants only relief is represented in a treble damage action in spite

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of this courts early recognition that other relief was available.

> "The Government also argues that the district court was correct in finding that the provision of a private treble damage remedy created a strong implication that the statute authorized no further relief to a citizen. We disagree. The grant to private citizens of a remedy that would not exist in the absence of specific authorization in no way precludes the availability of further relief consistent with the statutory scheme. Even if the victim is successful in a treble damage suit against the violators, his recovery does not correct the evil at which Sec. 810 was aimed, namely, that public moneys have been used to assist some citizens to hurt others in a manner inimical to the interest of the United States."

WHEREFORE, this appellant prays that the injunction be granted and that in consonance with the above quotation from Appendix Exhibit 8, page 3510, Footnote 8, this appellants standing under 31 U.S.C. 232 be affirmed.

Respectfully submitted,

s/s MARSHALL P. SAFIR

MARSHALL P. SAFIR
Pro Se

State of New York
County of Kings
Sworn before me this
third day of October, 1972

DAVID COLTON
Notary Public, State of New York
No. 43-5769140 Richmond County
Certificate Filed in Richmond County
Commission Expires March 30, 1974

EXHIBIT 8

Memorandum Incorporating Finding of Fact and Order, Dated June 6, 1972

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

68 C 643

MARSHALL P. SAFIR,

Plaintiff,

—against—

ANDREW GIBSON, Acting Maritime Administrator, Maritime Administration, U.S. Department of Commerce, et al.,

Defendants.

DOOLING, *D.J.*:

Plaintiff moves for an order requiring the Secretary of Commerce to pay the purchase price of the S.S. UNITED STATES into escrow and to establish an escrow of all amounts payable to the present shipowners upon their sales of the S.S. ARGENTINA, the S.S. BRAZIL, the S.S. SANTA ROSE, the S.S. SANTA PAULA, and the S.S. CONSTITUTION; the amounts referred to are expected to become payable under the provisions of Public Law 92-296 effective May 17, 1972 to United States Lines, Inc. (on the Government's purchase of the S.S. UNITED STATES under the public Law), to Moore-McCormack Lines, Incorporated (on the sale of the S.S. ARGENTINA and the S.S. BRAZIL into foreign ownership, registry, and flag pursuant to the provisions of Public Law 92-296 and subject to its limitations), to American Export Isbrandtsen Lines, Inc. (on the sale of the S.S. CONSTITUTION into foreign ownership, registry, and flag pursuant to the same public Law), and to Prudential-Grace Lines, Inc. under the same Public Law.

EXHIBIT 8

Memorandum Incorporating Finding of Fact and Order, Dated June 6, 1972

It appears that the recommended decision of the Hearing Examiner, rendered April 12, 1972, would require repayments by Moore-McCormack of $759,704, by United States Lines of $3,243,865 and by American Export Lines of $22,373 and that Prudential-Grace would not be required to make any refund payment. The Maritime Subsidy Board of the Maritime Administration has not yet reviewed the recommended decision of the Hearing Examiner. Exceptions have been taken to the Hearing Examiner's report by both sides and the exceptions are still undetermined.

Meanwhile and wholly separately the Congress passed and the President approved Public Law 92-296, effective May 17, 1972. It provides for the disposition of laid-up passenger vessels which had been operated under operating differential subsidy contracts with the United States. The law provides that, except for the vessels INDEPENDENCE and UNITED STATES, the laid-up vessels may be sold and transferred to foreign ownership, registry and flag with the approval of the Secretary of Commerce provided, among other things, that the seller agrees with the Secretary that an amount equal to the net proceeds received from the sale in excess of existing obligations and incidental expenses shall within a year of receipt be committed to and thereafter used as equity capital to build new vessels which the Secretary determines are built to effectuate the purposes and policies of the Merchant Marine Act of 1936 as amended. Section 2 of the same Act authorizes the Secretary to purchase the UNITED STATES at depreciated cost less the unpaid principal and interest on the mortgage on the vessel for lay-up in the National Defense Reserve Fleet.

Plaintiff contends that since the amount ultimately possibly recoverable by the Government from the AGAFBO steamship companies may rise as high as half a billion dol-

lars if the Examiner's recommended decision is not adopted, the amounts of money coming into the hands of the steamship companies under the new legislation should, in effect, be impounded to secure the payments that the steamship companies might be required to make to the United States under the final decision.

The motion must be in all respects denied.

The payments being made are not payments of subsidies in respect of the periods during which the offensive conduct was continued. The only ground on which the motion can be made is that a sort of anticipatory execution should be issued to assure that, if the ultimate decision directs greater refunds of operating differential subsidy than the Examiner recommends, funds to pay the refunds will be at hand. However, there is no reason to frustrate the functioning of the statute involved. The evidence presented does not indicate that the ability of any of the steamship companies to respond will be worsened by carrying out the new statute according to its terms or that any of the steamship companies will be in a position to dissipate the funds. Only in the case of the amounts paid to the United States Lines does it appear that refunds will pass into the unrestricted possession of the steamship company. The evidence shows that United States Lines is abundantly solvent. Similarly the evidence is that Moore-McCormack and American Export Isbrandtsen Lines, Inc. are solvent and will be able to respond to any requirement that they make refunds of subsidy.

No reason appears why the plaintiff should be entitled at this time to relief which is based essentially on the assumption that the Examiner's recommended decision is wrong and that the final decision will order vastly larger

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Memorandum Incorporating Finding of Fact and Order, Dated June 6, 1972

refunds. No such inference can be indulged to support an application for the relief of preliminary injunction. If that inference could be indulged, every other asset and every other pending receipt of any of the steamship companies could with equal plausibility be subjected to a demand that it be placed in escrow or otherwise set aside for execution in the event that large recoveries were ordered by the Subsidy Board. The affidavit of the Assistant Secretary of the Maritime Subsidy Board and the Maritime Administration shows that withheld amounts of operating differential subsidy of the four steamship companies exceed the amounts of the Hearing Examiner's recommended refund except in the case of United States Lines, which according to the official records of the Maritime Administration has a net worth of $74,000,000.

Plaintiff argues that he may have an individual right to participate in any ultimate recovery by the Government under *qui tam* legislation. No statute authorizing a *qui tam* recovery or *qui tam* proceedings has been pointed to and the decision in *Connecticut Action Now, Inc.* v. *Roberts Plating Company, Inc.*, 2d Cir. 1972, Slip Opinion page 2253 makes it reasonably clear that the plaintiff has no *qui tam* interest in the Government's recovery under Section 810 of the Merchant Marine Act, 1936 as amended (46 U.S.C. § 1227).

It is accordingly

ORDERED that the plaintiff's motions brought on by Orders to Show Cause dated May 4 and May 17, 1972, are in all respects denied.

Brooklyn, New York, June 6, 1972.

JOHN F. DOOLING, JR.,
U. S. D. J.

EXHIBIT 9

Decision (Per Curiam)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 237—September Term, 1972.

(Argued November 27, 1972 Decided November 29, 1972.)

Docket No. 72-1753

MARSHALL P. SAFIR,

Appellant,

v.

ROBERT J. BLACKWELL, Maritime Administrator, Maritime Administration, U.S. Department of Commerce, et al., MOORE-MCCORMACK LINES, INC., UNITED STATES LINES, INC., AMERICAN EXPORT LINES, INC., and PRUDENTIAL-GRACE LINES, INC.,

Appellees.

Before:

FRIENDLY, *Chief Judge,*

WATERMAN and HAYS, *Circuit Judges.*

Appeal from an order of the District Court for the Eastern District of New York, John F. Dooling, Jr., *Judge,* denying plaintiff's motion for an order requiring the payment into escrow of sums expected to be received by the ship operator defendants on the sale of certain ships.

Affirmed.

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Decision (Per Curiam)

PER CURIAM:

In this case, which is now here for the third time, see *Safir* v. *Gibson,* 417 F.2d 972 (2 Cir. 1969); *Safir* v. *Gibson,* 432 F.2d 137 (2 Cir.), *cert. denied,* 400 U.S. 850 (1970), plaintiff Safir moved to require the ship operator defendants to pay into escrow moneys expected to become payable to them in consequence of the sale of certain American flag ships authorized by Public Law 92-296, which became effective May 17, 1972. The motion was based on plaintiff's fear that the defendants might not be financially able to respond to a direction for the repayment of operating differential subsidies which may be made by the Maritime Administration Maritime Subsidy Board in the proceeding, Docket No. S. 243, instituted as a result of our first decision. The Assistant Secretary of the Board and of the Administration submitted an affidavit indicating that the Government entertained no doubt of its ability to recover, by set-off or otherwise, any amounts that might ultimately be found to be repayable. Accepting this conclusion, the district court denied the requested relief.

The judge's order was well within his discretion; he was not bound to accept plaintiff's assertions that the recoveries will run vastly beyond the sums recommended by the Chief Hearing Examiner in respect of three of the four ship operator defendants. We share plaintiff's concern over the time that the Maritime Administration has taken to decide this matter, especially in light of the narrowing of the issues by our 1970 decision. However, we were advised at argument that, at long last, the matter has now been finally submitted, and we expect it to be promptly decided.

Plaintiff complains of a statement by the district judge that he would have no interest in any recovery by the Government. This statement was unnecessary to the deci-

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Decision (Per Curiam)

sion and we have no occasion either to approve or to disapprove it.

Affirmed.

MARSHALL P. SAFIR, *Appellant Pro-Se.*

GILBERT S. FLEISCHER, Esq., New York, N.Y., Attorney in Charge, New York Office, Admiralty and Shipping Section, Department of Justice (Harlington Wood, Jr., Esq., Assistant Attorney General, Robert A. Morse, Esq., United States Attorney, of Counsel), *for Appellees Robert J. Blackwell, Maritime Administrator, et al.*

RICHARD S. SALZMAN, Esq., Washington, D.C. (J. Franklin Fort, Esq., Kominers, Fort, Schlefer & Boyer, Washington, D.C., of Counsel), *for Appellee Moore-McCormack Lines, Inc.*

ELMER C. MADDY, Esq., New York, N.Y. (Kirlin, Campbell & Keating, New York, N.Y., of Counsel), *for Appellee United States Lines, Inc.*

JAMES N. JACOBI, Esq., Washington, D.C. (Kurrus and Jacobi, Washington, D.C., of Counsel), *for Appellee American Export Lines, Inc.*

MICHAEL O. FINKELSTEIN, Esq., New York, N.Y. (Barrett, Knapp, Smith, Schapiro & Simon, New York, N.Y., Daniel H. Margolis, Esq., and Bergson, Borkland, Margolis & Adler, Washington, D.C., of Counsel), *for Appellee Prudential-Grace Lines, Inc.*

EXHIBIT 10

Memorandum Incorporating Findings of Fact and Order, Dated June 23, 1971

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

MARSHALL P. SAFIR and SAPPHIRE STEAMSHIP LINES, INC.,
Plaintiffs,

—against—

ANDREW GIBSON, Acting Maritime Administrator, Maritime Administration, United States Department of Commerce, JAMES S. DAWSON, JR., Secretary, Maritime Subsidy Board, Maritime Administration, United States Department of Commerce, and MAURICE STANS, Secretary of Commerce of the United States, AMERICAN PRESIDENT LINES, LTD., PRUDENTIAL LINES, INC. and GRACE LINE, INC. (Now operating as "Prudential-Grace Lines, Inc.") and FARRELL LINES, INC., AMERICAN EXPORT ISBRANDTSEN LINES, INC., BLOOMFIELD STEAMSHIP CO., LYKES BROS. STEAMSHIP COMPANY, INC., MOORE MCCORMACK LINES, INC., and UNITED STATES LINES, INC.,

Defendants.

DOOLING, *D.J.*:

Plaintiffs move for an injunction *pendente lite*, against the Maritime Administration's disbursing to the defendant AGAFBO carriers any part of the $80,000,000 appropriated by the Second Supplemental Appropriation Act, 1971, for the fiscal year ended June 30, 1971 (PL 92-18, approved May 26, 1971). Of the $80,000,000 about half, $40,300,000, is appropriated to liquidate, in part, unpaid ship operation subsidies for the calendar year 1968 and earlier years

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the payment of which has been delayed by disagreements over the subsidy amounts due the carriers. $43,150,521.94 was disbursed on and between May 27, 1971 and June 11, 1971, when disbursement was arrested pending decision of the present motion, leaving about $36,850,000 undisbursed, but how much of each segment comprises a part of the $40,300,000 is not disclosed, perhaps is not quickly determinable. The entire $40,300,000 appropriated to pay past-accrued but unliquidated subsidies is made up not of basic current-operating differential subsidies, which are generally disbursed as earned more or less currently to the extent of about 90% to 95% of the amount ultimately determined to be due, but with the held-back amounts consisting of balance-amounts due only when finally determined and agreed upon between carrier and Administration. The Secretary of the Maritime Subsidy Board avers without contradiction that of the $43,150,521.94 already disbursed $9,819,000. is the amount paid to the defendant AGAFBO carriers as past-accrued operating subsidies due for the whole of the two calendar years 1965 and 1966 which, together, include the eleven months of the accused rate-reduction. Eleven twenty-fourths of that total is somewhat over $4,500,000. How much of the undisbursed $36,850,000 will become ascribable to past-accrued operating subsidies of the years 1965 and 1966 is not stated. The defendant carriers, it is said, have unpaid vouchers, still unaudited and unauthenticated, lodged with the Board in the aggregate amount of $62,702,765, all of which, if audited and allowed, could, self-evidently, not be paid out of the present appropriation.

The matter is urgent because the availability of the appropriated funds will end at June 30, 1971, and renewal of the appropriation would, it seems, have to await fresh budgetary and Congressional action.

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Plaintiffs' central argument is that the present funds are not, within the meaning of the Court's decision, "current subsidy payments" (432 F.2d at 140, col. 2) payment of which ought not be enjoined, but belong to the radically distinguishable class of "payments . . . during the violation" (417 F.2d at 977, 432 F.2d at 140, col. 2), which, adventitiously, are found undisbursed and which, therefore, present afresh the, indeed, related but new question, should the Administration be required to withhold payment of an amount which the Administration may ultimately determine should not be paid because of the command of 46 U.S.C. § 1227, second paragraph ("Section 810")?

Most of the reasons urged for an injunction are not matters that would warrant judicial interference with the Administration's discharge of its responsibilities under the law as spelled out in the earlier decisions of the Court of Appeals, and an injunction could not be granted under the earlier decisions but for a differentiating feature here presented. It may have lurked in earlier determinations, but if so it was not brought forward recognizably.

Plainly enough, the issue here is differentiable from that which the Court determined on the injunction appeal. The dispositive difference is that before any disbursement is made that manifestly raises a substantial question under Section 810 there must be a specific and advertent decision by the Administration to make, to detain pending further review, or to refuse the payment. It is not a payment of past history presenting the question of whether in the light of all the circumstances the Administration should seek to recover money long since paid out and embedded in ship operations. The right to receive subsidy payments for the accused period is now directly in issue between the

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Administration and each affected carrier. The issue is whether, apart from the usually controlling earnings standards, etc., and in the light of the Commission's decision under 46 U.S.C. § 814 ("Section 15") and the Congressional command of Section 810, the payment is due and should be made automatically.

There is no distinct evidence that the matter of disbursement has been considered in the light of determining before disbursement the propriety of making a payment entitlement to which depends on the resolution of a policy decision to be made under Section 810. The Board's letter of June 8, 1971, to plaintiff Safir rather indicates the contrary, in part because the plaintiff Safir's peremptory telegram of May 28, 1971, dealt with the whole $80,000,000 and with withholding, as offset, to secure the payment of any recovery that might be directed in proceeding S-243. Yet the Court of Appeals decisions plainly required that no payment be made without a prior advertent and adequate dealing with the policy matters bearing on payability.

Seen in this perspective the duty of the Administration is forthwith to make a decision of record based on stated grounds either to make payment (absolutely or conditionally), to withhold payment pending review, or to refuse payment of so much of the undisbursed $36,849,478.06 appropriated by Public Law 92-18 of May 27, 1971, as represents payments to the defendant carriers in respect of past-accrued operating subsidies for the eleven month period March 31, 1965, to March 1, 1966.

In this analysis, which singles out for immediate rectification the apparent omission of an indispensable stage of judgmatical administrative action, the conventional stan-

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dards for granting injunctive relief, viewed as an extraordinary equitable remedy, are largely if not entirely irrelevant.

It is, accordingly,

ORDERED that the defendants Andrew Gibson, Acting Maritime Administrator, Maritime Administration, United States Department of Commerce, James S. Dawson, Jr., Secretary, Maritime Subsidy Board, Maritime Administration, United States Department of Commerce, and Maurice Stans, Secretary of Commerce of the United States, are enjoined from paying to American President Lines, Ltd., Prudential Lines, Inc. and Grace Line, Inc. (Now operating as "Prudential-Grace Lines, Inc.") and Farrell Lines, Inc., American Export Isbrandtsen Lines, Inc., Bloomfield Steamship Co., Lykes Bros. Steamship Company, Inc., Moore McCormack Lines, Inc., and United States Lines, Inc., so much of the undisbursed $36,849,478.06 appropriated by Public Law 92-18 of May 27, 1971, as represents payments to the defendant carriers in respect of past-accrued operating subsidies for the eleven month period March 31, 1965, to March 1, 1966, unless after a decision of record is made by the Maritime Administration on stated grounds to do so notwithstanding the determination of the Federal Maritime Commission of December 12, 1967, in Docket No. 65-13 under 46 U.S.C. §§ 814, 817, and the terms of 46 U.S.C. § 1227, or unless upon the taking of adequate stipulations and security measures for refunding that will assure that the issue whether the amounts should have been disbursed is determinable after payment exactly as if the whole decision-making process preceded the payment; and it is further

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Memorandum Incorporating Findings of Fact and Order, Dated June 23, 1971

ORDERED that plaintiff give security in the amount of $5,000 conditioned as required by Rule 65; and it is further

ORDERED that the defendants' application for a stay is denied; and it is further

ORDERED that plaintiff's motion for injunction is in all other respects denied; and it is further

ORDERED that the denial of injunction, as set forth in the preceding decretal paragraph, is stayed until 2:00 P.M. June 24, 1971, and the defendant public officers are directed until then to continue the present voluntary stay of disbursements to the defendant carriers from the appropriated funds.

Brooklyn, New York, June 22, 1971.

JOHN F. DOOLING, JR.,
U. S. D. J.

EXHIBIT 11

Decision of Court of Appeals, Dated February 26, 1970

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 552—September Term, 1969.

(Argued February 13, 1970 Decided February 26, 1970.)
Docket No. 34355

MARSHALL P. SAFIR, ARNOLD WEISSBERGER and SAPPHIRE STEAMSHIP LINES, INC.,
Plaintiffs-Appellants,

—v.—

ANDREW GIBSON, Successor to and Substituted for JAMES W. GULICK, Acting Maritime Administrator, Maritime Administration, United States Department of Commerce, JAMES S. DAWSON, JR., Secretary, Maritime Subsidiary Board, Maritime Administration, United States Department of Commerce, and MAURICE STANS, Successor to and Substituted for C. R. SMITH, Secretary of Commerce of the United States,
Appellees.

Before:

LUMBARD, *Chief Judge,*
FRIENDLY and FEINBERG, *Circuit Judges.*

Appeal from an order of the District Court for the Eastern District of New York, John F. Dooling, Jr., *Judge,* denying an injunction against the defendants from making

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further subsidy payments to members of a steamship conference who had allegedly violated § 810 of the Merchant Marine Act of 1936. Modified and affirmed.

ISADORE B. HURWITZ, Esq., New York, New York, *for Plaintiffs-Appellants.*

GILBERT S. FLEISCHER, Attorney, Admiralty & Shipping Section, Department of Justice, Washington, D.C. (William D. Ruckelshaus, Assistant Attorney General, Wash., D.C., Edward R. Neaher, United States Attorney, Eastern District of New York, Brooklyn, New York, and Louis E. Greco, Attorney in Charge, New York Office, Admiralty and Shipping Section, Department of Justice, of Counsel), *for Appellees.*

FRIENDLY, *Circuit Judge*:

This appeal is a sequel to our decision in *Safir* v. *Gibson,* 417 F.2d 972 (1969), where we held that under § 810 of the Merchant Marine Act, 1936, 46 U.S.C. § 1227, the Maritime Administration was "required to make a considered decision whether to recover the subsidies paid in the past" to members of AG FBO who had been found by the Federal Maritime Commission (FMC) to have violated § 15 of the Shipping Act, 1916, as amended, 46 U.S.C. § 814. Rates on U. S. Government Cargoes, Docket No. 65-13, 11 F.M.C. 263 (1967). After our decision was handed down, the Maritime Subsidy Board of the Maritime Administration initiated a proceeding, Docket No. S-243, on October 24, 1969, directing its chief hearing examiner to

conduct an investigation and compile a public record "which will provide a basis for recommending to the Maritime Subsidy Board whether Section 810, Merchant Marine Act, 1936, as amended (46 U.S.C. § 1227), has been violated and the appropriate action that should be taken." Steamship lines that were members of AGAFBO and received operating-differential subsidies during the period of the violations and the plaintiffs here were named as parties. Dissatisfied with this procedure, plaintiffs moved the District Court for the Eastern District of New York to issue an injunction restraining the defendants "from making any further payments of operating or construction differential subsidies to the members of AGAFBO which have violated Sec. 810 of the Merchant Marine Act, 1936" and to grant other appropriate relief. Judge Dooling denied the motion in all respects.

Insofar as the district court refused to enjoin current subsidy payments, its action was clearly consistent with our opinion, indeed compelled by it. We said we did not believe that § 810 protected "the interest of a carrier in having former violators barred from ever receiving subsidy payments despite their return to the path of virtue," and sharply distinguished making current payments to former violators from refusing to seek recovery of payments during the violation, 417 F.2d at 977. Plaintiffs do not charge that the AGAFBO members now receiving subsidy payments are violating § 810 or indeed that they have done so since March 1, 1966. The argument that these carriers will not have returned "to the path of virtue" until they have refunded all subsidy payments received during the period of violation is a far-fetched misreading of our decision.

On the other hand, while the district court was literally correct in its conclusion that we "did not find that Section

810 had been violated, or that a finding of a violation of Section 15 is a finding of a violation of Section 810 . . .," the primary reason why we did not do the latter was that the question was not raised. We called attention to the failure of the AGAFBO lines to seek intervention and rather pointedly invited them to do so, 417 F.2d at 976 n. 4. Their decision to remain on the sidelines should not prevent us from making a decision that will spare the plaintiffs the necessity of going through a costly and time-consuming redetermination of matters that have already been heard and decided by the agency having authority in the premises.

Section 810 of the Merchant Marine Act, 1936, makes it unlawful

> for any contractor receiving an operating-differential subsidy under sections 1171-1182 of this title or for any charterer of vessels under sections 1191-1204 of this title to continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.

Section 15 of the Shipping Act directs the Commission to disapprove any agreement "that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports . . . or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter . . ." Section 18(b)(5), 46 U.S.C. § 817(b)(5), added in 1961, 75 Stat. 764, directs the Com-

mission to disapprove "any rate or charge filed by a common carrier by water in the foreign commerce of the United States or conference of carriers which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States." A finding by the FMC that the rates of the AGAFBO members were unjustly discriminatory or unfair as between carriers would thus determine the same conduct as would constitute a violation of § 810, subject only to proof that the AGAFBO lines were receiving operating-differential subsidies at the time and that the carrier adversely affected was a "citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established route from and to a United States port or ports."

When we turn to the discussion by the FMC in Docket No. 65-13, Rates on U. S. Government Cargoes, 11 F.M.C. 263, 279, 283 (1967), we find the following:

> We consider now the AGAFBO reduced rates which became effective March 29, 1965. As previously seen, MSTS was informed by AGAFBO that the reductions were temporary and for competitive purposes only, and that they were not believed to be fair, reasonable, or compensatory. There can be little doubt that the drastic reductions were designed for but one purpose: namely, the elimination of Sapphire from the carriage of military cargo. Since the rate reductions were admittedly unreasonable and noncompensatory and were justified only in furtherance of the unfair attempt to drive Sapphire from the trade, we agree with the examiner and, under the circumstances, conclude that the reduced rates were so unreasonably low as to be detrimental to the commerce of the United States, and, therefore, contrary to section 18(b)(5) of the Act.

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> Thus, we will consider whether the rate reductions offended the provisions of section 15. AGAFBO itself characterized its reduced rates as unreasonably low. The operating data submitted by AGAFBO show that this admission was accurate. The reduced rates were simply an attempt to deprive Sapphire of some of the cargo which Sapphire expected would be generated by its rates. And AGAFBO, by means of its reduced rates, did in fact deprive Sapphire of the nucleus cargo which was indispensable to Sapphire's profitable operation. Under these circumstances, we find that the AGAFBO agreement, through its rate-making functions, operated in a manner which was knowingly at odds with the requirements of section 18(b)(5) and which was detrimental to the commerce of the United States and contrary to the public interest as well. AGAFBO's rates were detrimental to commerce because they were designed to and did have a disastrous effect on Sapphire. AGAFBO's rates were contrary to the public interest because they were predatory in nature and in derogation of an important aspect of the public intrest, the policy to foster competition to the extent compatible with the regulatory purposes of the Act. Isbrandtsen Co., Inc. v. United States, 211 F.2d 51 (D.C. Cir. 1954) cert. denied, 347 U.S. 990 (1954). We therefore, conclude that the AGAFBO agreement operated in a manner which was in violation of section 15.

The Commission's "Ultimate Conclusions" included, 11 F.M.C. at 287:[1]

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[1] Two of the four members who participated would have gone further and have held that AGAFBO's anticompetitive activities against Sapphire went beyond the scope of the conference agreement and violated § 15 on that ground, 11 F.M.C. at 288-90.

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[illegible] rates, which were reduced to an admittedly noncompensatory and unreasonable level in an attempt unfairly to compete with Sapphire were so unreasonably low as to be detrimental to the commerce of the United States contrary to the provisions of section 18(b)(5).

3. AGAFBO, by reducing its rates to an admittedly noncompensatory and unreasonable level in an attempt unfairly to compete with Sapphire, violated section 15 by knowingly setting rates which were contrary to section 18(b)(5) and which were detrimental to commerce and contrary to the public interest.

4. AGAFBO did not otherwise violate the Shipping Act.

The only basis we can perceive for arguing that the FMC's findings did not determine that AGAFBO's rates were "unjustly discriminatory or unfair" to Sapphire is that, rather than make an explicit finding to that effect, it chose to place decision on the ground that AGAFBO violated section 15 by knowingly and willfully setting rates which "were so unreasonably low as to be detrimental to the commerce of the United States, and, therefore, contrary to section 18(b)(5) of the Act." But to rest anything on that would be hypertechnical. The reason why the rates were found to be "so unreasonably low as to be detrimental to the commerce of the United States" was because the reductions "were admittedly unreasonable and noncompensatory and were justified only in furtherance of the unfair attempt to drive Sapphire from the trade." 11 F.M.C. at 279. The FMC's refusal to find that the AGAFBO lines "conspired to drive Sapphire from the trade in violation of section 15," 11 F.M.C. at 282, and its fourth conclusion, "AGAFBO did not otherwise violate the Shipping Act," do not justify a contrary result. Section 810 is violated not

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only when an agreement by a subsidized carrier is unjustly discriminatory or unfair to another American-flag carrier but when such carriers "engage in any practice in concert with another carrier or carriers by water" having that effect. While "practice" covers matters other than rates, see *California* v. *United States*, 320 U.S. 577 (1944), the framers of § 210 surely thought that the fixing of unjustly discriminatory or unfair rates aimed at an American-flag carrier pursuant to a conference agreement would constitute a "practice." See *Empire State Highway Ass'n* v. *F.M.B.*, 291 F.2d 336, 339 (D.C. Cir.), *cert. denied*, 368 U.S. 931 (1961); compare *F.M.C.* v. *New York Terminal Conference*, 373 F.2d 424, 427 (2 Cir. 1967).

Since the AGAFBO lines and Sapphire were parties to the FMC proceeding and the FMC was there the authorized representative of the United States as the Maritime Administrator is in the case now pending, see *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940), any "privity" that may be required for giving the FMC's determination the effect of collateral estoppel in the Maritime Administraiton proceeding exists. The Supreme Court has recently observed that "language to the effect that res judicata principles do not apply to administrative proceedings . . . is certainly too broad" and that "when an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose." *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 421-22 (1966). While the issues here may not have been purely factual, they were fully litigated before the agency designated to determine them. Cf. *Tampa Phosphate R.R.* v. *Seaboard Coast Line R.R.*, 418 F.2d 387, 396 (5 Cir. 1969). The Restatement of Judgments, § 70, says that even determinations of questions of

law are conclusive between the parties on a different cause of action unless injustice would result. The only possible injustice we can perceive from giving the FMC's determinations the effect of collateral estoppel in the Maritime Administration case arises from the fact that, in view of the relatively slight sanctions imposed in Docket No. 65-13, 11 F.M.C. at 288, namely, required modifications in the conference agreement, the AGAFBO carriers had no sufficient incentive to seek judicial review. However, the Commission's finding that AGAFBO violated section 15 of the Shipping Act subjected the member lines to a potential liability of $337,000 each under that section, and supplied ample motive for them to seek judicial review even if they did not anticipate the possible use of the FMC's conclusions in a subsequent Maritime Administration proceeding.

It is the FMC, not the Maritime Administration, that has the expertise to pass on whether rates are unfair or unduly discriminatory, cf. *Far East Conference* v. *United States*, 342 U.S. 570 (1952), and it would be quite unseemly for the Maritime Administration to conclude that its sister agency had been wrong on a fully litigated issue the decision of which Congress had confided to it, see 2 Davis, Administrative Law Treatise § 18.12 at 626 (1958). Any objection on the ground that two different statutes are involved, see *id.* § 18.04 at 576-80, is more than overcome in this case by the point that when Congress enacted § 810, the administration of subsidies was entrusted to the same agency, the United States Maritime Commission, that was to enforce the Shipping Act. See 46 U.S.C. § 1111, Historical Note, and our earlier opinion, 417 F.2d at 975 n. 2. The 1936 Congress would hardly have expected that after the USMC had found that rates were unjustly discriminatory and unfair while wearing its Shipping Act hat, it would reexamine that conclusion on assuming its hat under the Merchant Marine Act, 1936. The separation of functions

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in 1950, whereby authority on rate matters passed to what is now the Federal Maritime Commission, should not alter the result.

We recognize there is a general rule against judicial interference with administrative proceedings prior to the issuance of a final order, see *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); *IRC Air Freight Co. v. CAB*, ——— F.2d ——— (2 Cir. 1969), slip opinions 183, 194-95. Nevertheless we believe two features of this case make it appropriate for us to direct conformity with our views on the preclusive effect of the FMC decision here and now. First, the reason for applying *res judicata* to administrative agencies is not only to "enforce repose" but also to protect a successful party from being vexed with needlessly duplicitous proceedings. 2 Davis, Administrative Law Treatise § 18.12 (1958). If the latter interest is not protected at the outset of the second proceeding, it will be lost irreparably. Cf. *Lummus Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80, 88-89 (2 Cir. 1961), *cert. denied*, 368 U.S. 986 (1962). In this respect, a claim of *res judicata* differs from a claim that an administrative agency has no jurisdiction over the subject matter of the investigation, as in *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); *Macauley v. Waterman Steamship Corp.*, 327 U.S. 540 (1946); and *FPC v. Louisiana Power & Light Co.*, 330 U.S. 802 (1947), an issue which Congress meant to be decided in the first instance by the agency itself.

SEC v. Otis & Co., 338 U.S. 843, *rev'g* 176 F.2d 34 (D.C. Cir. 1949), is not to the contrary. There the SEC, in the course of an investigation, had sought enforcement of a subpoena compelling an attorney to testify to conversations with a client, alleging that the evidence theretofore compiled amounted to a *prima facie* showing that

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the client had consulted the attorney for a fraudulent purpose. The district judge found the evidence insufficient and denied enforcement. Subsequently the Commission announced its intention to determine whether the client's securities firms should be suspended or expelled from membership in the National Association of Securities Dealers because of its participation in the alleged fraud. The firm and the client, alleging that the Commission had no new evidence of fraud, sought a declaratory judgment that the prior determination was res judicata on the existence vel non of substantial evidence of fraud, and an injunction against the inquiry. The district court dismissed the complaint, the court of appeals reversed, and the Supreme Court reversed on the petition for certiorari in a brief per curiam citing the *Myers*, *Macaulay*, and *Arkansas Power & Light Co.* cases, *supra*.

This case is clearly distinguishable. In *Otis*, all parties appeared to agree, and we think correctly, that the SEC would not have been precluded by the prior determination if it had been able to come up with new evidence of fraud. Under the court of appeals holding, in order to avoid an injunction against the second proceeding, the SEC had to produce new evidence of fraud, the very matter which the proceeding was designed to discover. It would turn the administrative process on its head if, before the agency could make a determination, it had to convince a court that this would be supported by substantial evidence. Here, by contrast, the quantum of evidence to support or refute the FMC's determination is not relevant. The only issues are what that agency in fact determined and whether that determination is binding on the Maritime Administrator. The conclusions we have reached clearly follow from the face of the record and the relevant principles of statutory and administrative law.

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There is a second feature justifying judicial intervention at this stage. While the proceeding before the Maritme Subsidy Board is not being held pursuant to a court order, such an order surely would have issued under 28 U.S.C. § 1361 if the agency had not, by a timely compliance, made it unnecessary. If such an order had issued, the court would have had discretionary power to modify or clarify it if such action appeared necessary because the agency misunderstood the nature of the proceeding required. Its power is no less because the agency willingly, if to some extent mistakenly, attempted to comply with the thrust of our prior decision before being ordered to do so.

We emphasize that the courts' power to clarify the nature of the proceeding which the agency must undertake does not mean that exercise of that power is necessary, or even appropriate, in every dispute that may arise over the manner in which the proceeding is being conducted. In most situations, the reasons for the normal exhaustion requirement will prevail over anything to be gained by immediate intervention. Here, however, there is nothing to be gained and much to be lost by waiting for the agency to finish its deliberation without receiving proper instructions.

We therefore direct the district court to instruct the Maritime Administration not to redetermine the issue whether the AGAFBO carriers' concerted action in reducing their rates to an unreasonably low level and holding them there for eleven months was unjustly discriminatory or unfair to Sapphire.[2] With this modification, the order denying an injunction is affirmed. No costs.

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[2] Nothing we have said should be read as preventing the Maritime Administration from investigating the nature and extent of the individual carriers' participation in the illegal action, should it find these matters relevant to its ultimate decision on whether to seek recovery of subsidies paid during the violation and, if so, how much and from whom.

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 571/2/3—September Term, 1968.

(Argued June 2, 1969 Decided September 26, 1969.)

Docket Nos. 33389/90/91

MARSHALL P. SAFIR, ARNOLD WEISSBERGER and SAPPHIRE STEAMSHIP LINES, INC.,

Plaintiffs-Appellants,

—v.—

ANDREW GIBSON, Successor to and Substituted for JAMES W. GULICK, Acting Maritime Administrator, Maritime Administration, United States Department of Commerce, JAMES S. DAWSON, JR., Secretary, Maritime Subsidiary Board, Maritime Administration, United States Department of Commerce, and MAURICE STANS, Successor to and Substituted for C. R. SMITH, Secretary of Commerce of the United States,

Appellees.

Before:

WATERMAN, FRIENDLY and KAUFMAN,

Circuit Judges.

Appeal from an order of the District Court for the Eastern District of New York, John F. Dooling, Jr., *Judge*, dismissing a complaint by an American-flag steamship company and two of its officers and stockholders seeking a

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declaratory judgment and an order compelling the Maritime Administration to recover subsidies already paid and to cease further payments to members of a conference found by the Federal Maritime Commission to have engaged in predatory tactics to destroy competition on the part of plaintiff steamship company. Reversed and remanded.

ISADORE B. HURWITZ, New York, N. Y., *for Plaintiffs-Appellants.*

DANIEL JOSEPH (William D. Ruckelshaus, Assistant Attorney General; Vincent T. McCarthy, United States Attorney; Alan S. Rosenthal, Attorney, Dep't of Justice, Washington, D. C.), *for Appellees.*

FRIENDLY, *Circuit Judge*:

The plaintiffs in this action are Sapphire Steamship Lines, Inc., and two of its officers and stockholders. In March, 1965, Sapphire began operations as an unsubsidized common carrier by water, undercutting the rates of various carriers which were members of a conference known as the Atlantic and Gulf American Flag Berth Operators (AGAFBO). Shortly theerafter, on March 29, 1965, AGAFBO drastically reduced its rates to an admittedly unfair, unreasonable and noncompensatory level. As a result of this reduction, Sapphire was deprived of cargo which was indispensable to its profitable operation. Some eleven months later, on March 1, 1966, AGAFBO raised its rates to their former levels. Sapphire went out of business in March of the following year and was adjudged a bankrupt that May.

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On December 12, 1967, the Federal Maritime Commission issued a report, Docket No. 65-13, on the result of an investigation "of virtually the entire spectrum of the U.S. military cargoes," in which AGAFBO was a respondent. The Commission concluded that "the drastic reductions [in AGAFBO's rates] were designed for but one purpose, the elmination of Sapphire from the carriage of military cargo" by unfair competition, and thus were "so unreasonably low as to be detrimental to the commerce of the United States and contrary to the public interest as well." The Commission found that by willfully setting its rates at this level AGAFBO violated § 15 of the Shipping Act, 1916, as amended, 46 U.S.C. § 814.[1]

Counsel for Sapphire promptly wrote the Acting Maritime Administrator and the Maritime Subsidy Board requesting that subsidy payments to members of AGAFBO be terminated and that action be instituted to recover subsidies paid since March 29, 1965, the date AGAFBO reduced its rates.[2] The request was based on § 810 of the

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[1] The commission elaborated on its finding as follows:

> AGAFBO's rates were detrimental to commerce because they were designed to and did have a disastrous effect on Sapphire. AGAFBO's rates were contrary to the public interest because they were predatory in nature and in derogation of an important aspect of the public interest, the policy to foster competition to the extent compatible with the regulatory purposes of the Act. (Footnote omitted.)

Two of the four Commissioners who participated in the report would also have found that the members of AGAFBO engaged in a conspiracy to drive Sapphire out of the trade.

[2] The functions now performed by the Federal Maritime Commission and by the Maritime Administration and its Subsidy Board were originally vested in the United States Maritime Commission. By Reorganization Plan No. 21 of 1950, 64 Stat. 1273, and Reorganization Plan No. 7 of 1961, 75 Stat. 840, the regulatory functions of the United States Martime Commission were transferred to the Federal Maritime Commission, an independent

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Merchant Marine Act, 1936, 46 U.S.C. § 1227, which provides:

> It shall be unlawful for any contractor receiving an operating-differential subsidy under sections 1171-1182 of this title or for any charterer of vessels under sections 1191-1204 of this title to continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.
>
> No payment or subsidy of any kind shall be paid directly or indirectly out of funds of the United States or any agency of the United States to any contractor or charterer who shall violate this section. Any person who shall be injured in his business or property by reason of anything forbidden by this section may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

The Secretary of the Subsidy Board answered that the Board would "take whatever action is deems appropriate in keeping with the provisions of the Merchant Marine Act of 1936, as amended." Similar letters written after expiration of the time to appeal from the FMC's decision received a similar noncommittal reply. In fact, the Maritime Administration has taken no action whatever.

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agency, and the functions relating to the award, amendment, and termination of subsidy contracts were transferred to the Maritime Administration, an agency within the Department of Commerce.

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Plaintiffs thereupon instituted this suit in the District Court for the Eastern District of New York against the Acting Maritime Administrator, the Secretary of the Subsidy Board, and the Secretary of Commerce. The complaint alleged substantially the foregoing facts and sought a declaration that § 810 barred subsidy payments to the AGAFBO lines and an order compelling defendants to stop such payments and to take appropriate legal action to recover subsidies paid since March 29, 1965. Federal jurisdiction was sufficiently predicated on 28 U.S.C. § 1337, which gives the district courts jurisdiction over any actions arising under any Act of Congress regulating commerce, cf., *Empresa Hondurena de Vapores, S.A.* v. *McLeod,* 300 F.2d 222, 226-27 (2 Cir. 1962), vacated on other grounds sub nom. *McCulloch* v. *Sociedad Nacional de Marineros de Honduras,* 372 U.S. 10 (1963), and 28 U.S.C. § 1361, which gives the district courts jurisdiction over "any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." [3] On defendants' motion the complaint was dismissed for failure to state a claim on which relief could be granted.[4] The plaintiffs have appealed.

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[3] We thus need not consider the mooted question whether § 10 of the APA, 5 U.S.C. §§ 701-04, constitutes an independent basis for federal jurisdiction. See Byse & Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action, 81 Harv. L. Rev. 308, 326-31 (1967).

[4] The defendants also moved to dismiss the complaint for improper venue and for failure to join indispensable parties, or, in the alternative, for a transfer to the District of Columbia under 28 U.S.C. § 1404(a). The court below found it unnecessary to pass on these points in view of its holding that the complaint failed to state a cause of action.

While the parties have not discussed in this court whether the AGAFBO lines were required to be joined as defendants, we are concerned that disposition of the action in their absence

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Two major issues are presented: Whether plaintiffs have standing to sue, and if so, to what extent the acts complained of are unreviewable because they are committed to agency discretion. Neither question can be answered without a close examination of the statute to determine what interests it was designed to protect and how it was designed to protect them. It is unfortunate—though not surprising—that § 810 does not deal expressly with a situation where the Maritime Administrator refuses to take steps concerning subsidy payments to violators; since it does not, we must analyze the statutory scheme as a whole and the legislative history of the Act to arrive at a judgment of what Congress would have wanted done if this problem had occurred to it.

At the outset we must reject the suggestion of the district court that because the statute is difficult to interpret, its interpretation is a matter entirely within the agency's discretion. As Professor Jaffe has said, "Discretion . . . is not self-defining; it does not arise parthenogenetically from 'broad' phrases. Its contour is determined by the courts, which must define its scope and its limit." Jaffe, Judicial Control of Administrative Action 572 (1965). We deal here with an issue requiring reconciliation of two conflicting statutory purposes—the general policy of the Act to build up the American merchant marine through subsidy payments and the direction of § 810 for withdrawal of those subsidies when they are used to hurt rather than help. "The question in each case of consistency with statutory purpose is addressed to the judge." *Id.* at 575.

"may . . . as a practical matter impair or impede" their ability to protect their interests in the subject matter of this litigation. F.R. Civ. P. 19. Accordingly, if the district court should require their joinder or if they should intervene, we would not wish the district court to feel that anything said in this opinion precludes its considering any new arguments which the AGAFBO lines may bring to its attention.

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The Merchant Marine Act, 1936, §§ 501-610, 49 Stat. 1995, provided a new method of subsidizing American-flag shipping, primarily by construction-differential and operating-differential subsidies. In the course of debate, Senator O'Mahoney of Wyoming and Senator Clark of Missouri brought up the case of a subsidized American-flag line which by a conference agreement with foreign lines was "crushing out of existence an American line which enjoys no subsidy." The victim had assured the committee that "without any subsidy, if removed from the incubus of this conference and of the subsidy which is granted to the American subsidized line, . . . [it] could compete with all the lines of the world." 80 Cong. Rec. 9921 (1936). Senator O'Mahoney asked Senator Copeland of New York, who was in charge of the bill:

> Would it not be a simple matter to provide by amendment that no subsidy of any kind or character shall be paid to any shipping line or shipping concern which has entered into an arrangement to destroy any other American line? *Id.* 9922.

Senator Copeland undertook to "consult the experts and see if they can choose language to cover what the Senator has in mind." *Id.* The next day Senator O'Mahoney offered an as amendment what became § 810. After referring to the evil "of paying a subsidy to an American line which was in truth and fact engaged in a conspiracy with foreign lines to discriminate against another American line," he stated, more broadly, that the amendment would "make it clear to the [United States Maritime] Commission that it is the intention of Congress not to pay subsidies of any kind to any American line which is willing to enter into any combination wtih other lines, including those operating under foreign flags, to crush American competition."[5] He added:

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[5] Apart from the language of § 810 itself, this statement answers defendants' contention that the statute is inapplicable here because AGAFBO was composed solely of American lines.

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> In order to give an opportunity to those who may be injured by illegal combinations of the kind I have described to protect themselves I have incorporated in this amendment the principle of section 4 of the Clayton Act which permits the victim of such unfair practices to sue for treble damages.

Senator Copeland made no objection and the amendment was adopted. 80 Cong. Rec. 10075-76 (1936).

The legislative history demonstrates that termination of subsidies was not designed to be a purely penal measure, although quite likely the punitive effect was considered a desirable byproduct. The primary concern manifested was with the added burden which subsidies impose on the competitive position of the victim. We think this concern also extends to the interest of a former victim in the recovery of subsidies improperly paid in the past to lines which are still his competitors, although here the duty of the Administrator may be less absolute than in the obligation to cease payments to current violators. In the nature of things, few complaints of violations will be received and acted on until after some further payments have already been made. Recovery of such payments imposes an added cost on the violators and thus will partially make up to the victim for the burden which the earlier payments indirectly imposed on him.[6] Although the statute does not expressly authorize the Maritime Administrator to recover subsidies improperly paid in the past, common law principles would permit this

[6] The district court thought that withdrawal of the subsidies was unrelated to the competitive interest of the injured line since other innocent lines could at once be admitted to the routes and subsidized. Apart from the question whether any such lines are waiting in the wings, Congress felt that subsidy payments to violators did affect the competitive position of the victim and we see no reason why we should or could reject that conclusion.

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under the subsidy contract in the absence of a statutory prohibition, and we find no such prohibition here. On the other hand, we do not believe that § 810 protects the interest of a carrier in having former violators barred from ever receiving subsidy payments despite their return to the paths of virtue. In fact, we do not think § 810 even authorizes the Administrator to take such a step. So far as concerns payments, as distinguished from recoveries, the statute is mandatory, where applicable, contrast §§ 606(1), 806(c), 46 U.S.C. § 1176(1), 1228, and perpetual debarment would be an exceedingly harsh result, which might fatally interfere with the general policy of the Act to foster the development of the American merchant marine.

Construing the statute as we do, we think Sapphire has standing to question the Administrator's failure to seek recovery of the subsidies paid during the period of violation. Since we find that § 810 was designed to promote the competitive interest of a victim by authorizing the recovery of subsidies improperly paid in the past, it follows that this interest is legally protected, see *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1, 5-7 (1968), and that disregard of it is a "legal wrong" within the meaning of § 10(a) of the Administrative Procedure Act, 5 U.S.C. § 701. While Sapphire is not presently competing with the AGAFBO lines, we deem that irrelevant in the circumstances of this case. Sapphire was forced out of business by the violation of § 810, and plaintiff Safir stated in an affidavit that he desired to return to the shipping business as soon as possible. Without deciding whether a potential competitor or a former victim who has washed his hands of the business would have an interest protected by § 810, we hold that an interruption of operations like that here does not sufficiently alter the victim's interest to take it out of the

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protection of § 810 with regard to raising the issue of the Administrator's refusal to seek recovery of past payments.[7]

The Government contends that even if plaintiffs have standing, the Administrator's failure to act is a matter within his sole discretion and therefore neither reviewable under § 10 of the APA, 5 U.S.C. § 701(a)(2), nor the proper subject of an order in the nature of mandamus, cf. 28 U.S.C. § 1361.[8] The arguments come to the same thing and we reject them both. While the Maritime Administrator may have some discretion in connection with the recovery of past subsidies as distinguished from payments to current violators, the discretion is not unlimited. Cf. *American Mail Line, Ltd.* v. *Gulick*, 411 F.2d 696 (D.C. Cir. 1969); *Moore-McCormack Lines, Inc.* v. *U. S.*, 38 U.S.L.W. 2112 (Ct. Cl. July 16, 1969). Specifically, he may not refuse to proceed against the AGAFBO lines without at least considering the interest of the victim, about which Congress

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[7] 28 U.S.C. § 1361 speaks of "a duty to the plaintiff" rather than of a "legal wrong." The quoted language, proposed by the Department of Justice, was accepted by the sponsors of the legislation as incorporating the law on the availability of mandamus. We think that under a rational law of mandamus such an order is available to anyone entitled to review under § 10(a) of the APA and seeking affirmative official action. See generally Byse & Fiocca, *supra*, note 3 81 Harv. L. Rev. at 316, 320.

[8] The Government also argues that the district court was correct in finding that the provision of a private treble damage remedy created a strong implication that the statute authorized no further relief to a citizen. We disagree. The grant to private citizens of a remedy that would not exist in the absence of specific authorization in no way precludes the availability of further relief consistent with the statutory scheme. Even if the victim is successful in a treble damage suit against the violators, his recovery does not correct the evil at which § 810 was aimed, namely, that public moneys have been used to assist some citizens to hurt others in a manner inimical to the interest of the United States.

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was so concerned. There may be other limits on his discretion, but we need not decide this now. If plaintiffs' allegations are true, the Maritime Administration was at least required to make a considered decision whether to recover the subsidies paid in the past. An answer will reveal whether it has done this and, if so, whether on grounds consistent with the statute. For the present we ask only that the Maritime Administration give clear indication that it has properly exercised the discretion with which Congress has endowed it. *Phelps Dodge Corp.* v. *NLRB,* 313 U.S. 177, 197 (1941).

The order dismissing the complaint for failure to state a claim on which relief can be granted is reversed and the cause is remanded for further proceedings consistent with this opinion.

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Decision of Supreme Court of the United States "Overton", Dated March 2, 1971

(402)

CITIZENS TO PRESERVE OVERTON PARK, INC., ET AL. v. VOLPE, SECRETARY OF TRANSPORTATION, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 1066. Argued January 11, 1971—Decided March 2, 1971

Under § 4 (f) of the Department of Transportation Act of 1966 and § 138 of the Federal-Aid Highway Act of 1968, the Secretary of Transportation may not authorize use of federal funds to finance construction of highways through public parks if a "feasible and prudent" alternative route exists. If no such route is available, he may approve construction only if there has been "all possible planning to minimize harm" to the park. Petitioners contend that the Secretary has violated these statutes by authorizing a six-lane interstate highway through a Memphis public park. In April 1968 the Secretary announced that he agreed with the local officials that the highway go through the park; in September 1969 the State acquired the right-of-way inside the park; and in November 1969 the Secretary announced final approval, including the design, of the road. Neither announcement of the Secretary was accompanied by factual findings. Respondents introduced affidavits in the District Court, indicating that the Secretary had made the decision and that it was supportable. Petitioners filed counter affidavits and sought to take the deposition of a former federal highway administrator. The District Court and the Court of Appeals found that formal findings were not required and refused to order the deposition of the former administrator. Both courts held

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that the affidavits afforded no basis for determining that the Secretary exceeded his authority. *Held*:

1. The Secretary's action is subject to judicial review pursuant to § 701 of the Administrative Procedure Act. Pp. 409-413.

(a) There is no indication here that Congress sought to limit or prohibit judicial review. P. 410.

(b) The exemption for action "committed to agency discretion" does not apply as the Secretary does have "law to apply," rather than wide-ranging discretion. Pp. 410-413.

2. Although under § 706 of the Act *de novo* review is not required here and the Secretary's approval of the route need not (403) meet the substantial-evidence test, the reviewing court must conduct a substantial inquiry and determine whether the Secretary acted within the scope of his authority, whether his decision was within the small range of available choices, and whether he could have reasonably believed that there were no feasible alternatives. The court must find that the actual choice was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and that the Secretary followed the necessary procedural requirements. Pp. 413-416.

3. Formal findings by the Secretary are not required in this case. Pp. 417-419.

(a) The relevant statutes do not require formal findings, and there is no ambiguity in the Secretary's action. P. 417.

(b) Although a regulation requiring formal findings was issued after the Secretary had approved the route, a

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remand to him is not necessary as there is an administrative record facilitating full and prompt review of the Secretary's action. Pp. 417-419.

4. The case is remanded to the District Court for plenary review of the Secretary's decision. Pp. 419-420.

(a) The lower court's review was based on litigation affidavits, which are not the whole record and are an inadequate basis for review. P. 419.

(b) In view of the lack of formal findings, the court may require the administrative officials who participated in the decision to give testimony explaining their action or require the Secretary to make formal findings. P. 420.

432 F.2d 1307, reversed and remanded.

MARSHALL, J., wrote the opinion of the Court, in which BURGER, C. J., *and* HARLAN, STEWART, WHITE, and BLACKMUN, J. J., joined. BLACK, J., filed a separate opinion, in which BRENNAN, J., joined, *post,* p. 421. BLACKMUN, J., filed a separate statement, *post,* p. 422. DOUGLAS, J., took no part in the consideration or decision of this case.

John W. Vardaman, Jr., argued the cause for petitioners. With him on the briefs was *Edward Bennett Williams.*

Solicitor General Griswold argued the cause for respondent Volpe. With him on the brief were *Assistant Attorney* (404) *General Gray, Alan S. Rosenthal,* and *Daniel Joseph. J. Alan Hanover* argued the cause for respondent Speight. With him on the brief were *David M. Pack,* Attorney General of Tennessee, *Lurton C. Goodpasture,* Assistant Attorney General, and *James B. Jalenak.*

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Briefs of *amici curiae* were filed by *James M. Manire* and *Jack Petree* for the city of Memphis et al., and by *Roberts B. Owen* and *Gerald P. Norton* for the Committee of 100 on the Federal City, Inc., et al.

Opinion of the Court by MR. JUSTICE MARSHALL, announced by MR. JUSTICE STEWART.

The growing public concern about the quality of our natural environment has prompted Congress in recent years to enact legislation [1] designed to curb the accelerating destruction of our country's natural beauty. We are concerned in this case with § 4(f) of the Department of Transportation Act of 1966, as amended,[2] and § 18(a) of

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[1] See, *e.g.*, The National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. § 4321 *et seq.* (1964 ed., Supp. V); Environmental Education Act, 84 Stat. 1312, 20 U.S.C. § 1531 *et seq.* (1970 ed.); Air Quality Act of 1967, 81 Stat. 485 U. S. C. § 1857 *et seq.* (1964 ed., Supp. V); Environmental Quality Improvement Act of 1970, 84 Stat. 114, 42 U. S. C. §§ 4371-4374 (1970 ed.).

[2] "It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After August 23, 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative

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(405) the Federal-Aid Highway Act of 1968, 82 Stat. 823, 23 U. S. C. § 138 (1964 ed., Supp. V) (hereafter § 138).[3] These statutes prohibit the Secretary of Transportation from authorizing the use of federal funds to finance the construction of highways through public parks if a "feasible and prudent"[4] alternative route exists. If no such route is available, the statutes allow him to approve construction through parks only if there has been "all possible planning to minimize harm"[5] to the park.

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to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use." 82 Stat. 824, 49 U. S. C. § 1653 (f) (1964 ed., Supp. V).

[3] "It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use." 23 U. S. C. § 138 (1964 ed., Supp.V).

[4] 49 U. S. C. § 1653 (f) (1964 ed., Supp. V); 23 U. S. C. § 138 (1964 ed., Supp. V).

[5] *Ibid.*

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Petitioners, private citizens as well as local and national conservation organizations, contend that the Secretary has violated these statutes by authorizing the expenditure of federal funds[8] for the construction of a six-lane interstate highway through a public park in Memphis, Tennessee. Their claim was rejected by the District Court,[7] which granted the Secretary's motion for summary judgment, and the Court of Appeals for the Sixth Circuit affirmed.[8] After oral argument, this Court granted a stay that halted construction and, treating the application for the stay as a petition for certiorari, granted review.[9] 400 U. S. 939. We now reverse the judgment below and remand for further proceedings in the District Court.

Overton Park is a 342-acre city park located near the center of Memphis. The park contains a zoo, a nine-hole municipal golf course, an outdoor theater, nature trails, a bridle path, an art academy, picnic areas, and 170 acres of forest. The proposed highway, which is to be a six-lane, high-speed, expressway,[10] will sever the zoo from the rest of the park. Although the roadway will be depressed below ground level except where it crosses a small creek, 26 acres of the park will be destroyed.

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[8] See 23 U. S. C. § 103.

[7] The case originated in the United States District Court for the District of Columbia. On application of the Secretary of Transportation it was transferred to the United States District Court for the Western District of Tennessee, which entered the summary judgment.

[8] 432 F. 2d 1307 (CA6 1970).

[9] This Court ordered the case to be heard on an expedited schedule.

[10] The proposed right-of-way will be 250 to 450 feet wide and will follow the route of a presently existing, nonaccess bus route, which carries occasional bus traffic along a 40- to 50-foot right-of-way.

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The highway is to be a segment of Interstate Highway I—40, part of the National System of Interstate and (407) Defense Highways.[11] I—40 will provide Memphis with a major east-west expressway which will allow easier access to downtown Memphis from the residential areas on the eastern edge of the city.[12]

Although the route through the park was approved by the Bureau of Public Roads in 1956 [13] and by the Federal Highway Administrator in 1966, the enactment of § 4(f) of the Department of Transportation Act prevented distribution of federal funds for the section of the highway designated to go through Overton Park until the Secretary of Transportation determined whether the requirements of § 4(f) had been met. Federal funding for the rest of the project was, however, available; and the state acquired a right-of-way on both sides of the park.[14] In April 1968, the Secretary announced that he concurred in the judgment of local officials that I—40 should be built through the park. And in September 1969 the State acquired the right-of-way inside Overton Park from the city.[15] Final

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[11] See 23 U. S. C. § 103 (d) (1964 ed., Supp. V).

[12] I-40 will also provide an express bypass for east-west traffic through Memphis.

[13] At that time the Bureau of Public Roads was a part of the Department of Commerce. The Department of Transportation Act, 49 U. S. C. § 1651 *et seq.* (1964 ed., Supp. V), which became effective on April 1, 1967, transferred the Bureau to the new Department of Transportation.

[14] The Secretary approved these acquisitions in 1967 shortly after the effective date of § 4 (f).

[15] The State paid the City $2,000,000 for the 26 acre right-of-way and $206,000 to the Memphis Park Commission to replace park facilities that were to be destroyed by the highway. The city of Memphis has used $1,000,000 of these funds to pay for a new 160-acre park and it is anticipated that additional parkland will be acquired with the remaining money.

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approval for the project—the route as well as the design—was not announced until November 1969, after Congress had reiterated in § 138 of the Federal-Aid Highway Act (408) that highway construction through public parks was to be restricted. Neither announcement approving the route and design of I—40 was accompanied by a statement of the Secretary's factual findings. He did not indicate why he believed there were no feasible and prudent alternative routes or why design changes could not be made to reduce the harm to the park.

Petitioners contend that the Secretary's action is invalid without such formal findings [16] and that the Secretary did not make an independent determination but merely relied on the judgment of the Memphis City Council.[17] They also contend that it would be "feasible and prudent" to route I—40 around Overton Park either to the north or to the south. And they argue that if these alternative routes are not "feasible and prudent," the present plan does not include "all possible" methods for reducing harm to the park Petitioners claim that I—40 could be built under the park by using either of two possible tunneling methods,[18] and they claim that, at a

[16] Respondents argue that the only issue raised by petitioners' pleadings is the failure of the Secretary to make formal findings. But when petitioners' complaint is read in the revealing light of *Conley* v. *Gibson*, 355 U. S. 41 (1957), it is clear that petitioners have also challenged the merits of the Secretary's decision.

[17] Petitioners contend that former Federal Highway Administrator Bridwell's account of an April 3, 1968, meeting with the Memphis City Council given to the Senate Subcommittee on Roads of the Senate Committee on Public Works supports this charge. See hearings on Urban Highway Planning, Location, and Design before the Subcommittee on Roads of the Senate Committee on Public Works, 90th Cong., 1st and 2d Sess., pt. 2, pp. 478-480 (1968).

[18] Petitioners argue that either a bored tunnel or a cut-and-cover tunnel, which is a fully depressed route covered after con-

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(409) minimum, by using advanced drainage techniques [19] the expressway could be depressed below ground level along the entire route through the park including the section that crosses the small creek.

Respondents argue that it was unnecessary for the Secretary to make formal findings, and that he did, in fact, exercise his own independent judgment which was supported by the facts. In the District Court, respondents introduced affidavits, prepared specifically for this litigation, which indicated that the Secretary had made the decision and that the decision was supportable. These affidavits were contradicted by affidavits introduced by petitioners, who also sought to take the deposition of a former Federal Highway Administrator [20] who had participated in the decision to route I—40 through Overton Park.

The District Court and the Court of Appeals found that formal findings by the Secretary were not necessary and refused to order the deposition of the former Federal Highway Administrator because those courts believed that probing of the mental processes of an administrative decisionmaker was prohibited. And, believing that the Secretary's authority was wide and reviewing courts' authority narrow in the approval of highway routes, the lower courts

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struction, could be built. Respondents contend that the construction of a tunnel by either method would greatly increase the cost of the project, would create safety hazards, and because of increases in air pollution would not reduce harm to the park.

[19] Petitioners contend that adequate drainage could be provided by using mechanical pumps or some form of inverted siphon. They claim that such devices are often used in expressway construction.

[20] Petitioners wanted to question former Highway Administrator Bridwell. See n. 17, *supra*.

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held that the affidavits contained no basis for a determination that the Secretary had exceeded his authority.

We agree that formal findings were not required. But we do not believe that in this case judicial review based solely on litigation affidavits was adequate.

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A threshold question—whether petitioners are entitled to any judicial review—is easily answered. Section 701 of the Administrative Procedure Act, 5 U. S. C. § 701 (1964 ed., Supp. V), provides that the action of "each authority of the Government of the United States," which includes the Department of Transportation,[21] is subject to judicial review or where "agency action is committed to agency discretion by law." In this case, there is no indication that Congress sought to prohibit judicial review and there is most certainly no "showing of 'clear and convincing evidence' of a . . . legislative intent" to restrict access to judicial review. *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 141 (1967). *Brownell* v. *We Shung*, 352 U. S. 180, 185 (1956).[22]

Similarly, *the Secretary's decision here does not fall within the exception for action "committed to agency discretion." This is a very narrow exception.*[23] Berger,

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[21] In addition, the Department of Transportation Act makes the Administrative Procedure Act applicable to proceedings of the Department of Transportation. 49 U. S. C. § 1655 (h) (1964 ed., Supp. V).

[22] See also *Rusk* v. *Cort*, 369 U. S. 367, 379-380 (1962).

[23] The scope of this exception has been the subject of extensive commentary. See *e.g.*, Berger, Administrative Arbitrariness: A Synthesis, 78 Yale L. J. 965 (1969); Saferstein, Nonreviewability: A Functional Analysis of "Committed to Agency Discretion," 82 Harv. L. Rev. 367(1968); Davis, Administrative Arbitrariness is Not Always Reviewable, 51 Minn. L. Rev. 643 (1967); Berger, Administrative Arbitrariness: A Sequel, 51 Minn. L. Rev. 601 (1967).

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Administrative Arbitrariness and Judicial Review, 65 Col. L. Rev. 55 (1965). The legislative history of the Administrative Procedure Act indicates that *it is applicable in those rare instances where "statutes are drawn in such broad terms that in a given case there is no law to apply."* S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945). (Emphises added.)
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Section 4 (f) of the Department of Transportation Act and § 138 of the Federal-Aid Highway Act are clear and specific directives. Both the Department of Transportation Act and the Federal-Aid Highway Act provide that the Secretary "shall not approve" any program or project" that requires the use of any public parkland "unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park . . . ." 23 U. S. C. § 138 (1964 ed., Supp. V); 49 U. S. C. § 1653 (f) (1964 ed., Supp. V). This language is a plain and explicit bar to the use of federal funds for construction of highways through parks—only the most unusual situations are exempted.

Despite the clarity of the statutory language, respondents argue that the Secretary has wide discretion. They recognize that the requirement that there be no "feasible" alternative route admits of little administrative discretion. For this exemption to apply the Secretary must find that as a matter of sound engineering it would not be feasible to build the highway along any other route.[24] *Respondents argue, however, that the requirement that there be no other "prudent" route requires the Secretary to engage in a wide-ranging balancing of competing interests.* They contend that the Secretary should weigh the detriment resulting from the destruction of parkland against the cost of other routes, safety considerations,

[24] See 114 Cong. Rec. 19915 (statement by Rep. Holifield).

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and other factors, and determine on the basis of the importance that he attaches to these other factors whether, on balance, alternative feasible routes would be "prudent." (Emphasis added.)

But no such wide-ranging endeavor was intended. It is obvious that in most cases considerations of cost, directness of route, and community disruption will indicate that parkland should be used for highway construction (412) whenever possible. Although it may be necessary to transfer funds from one jurisdiction to another,[25] there will always be a smaller outlay required from the public purse[26] when parkland is used since the public already owns the land and there will be no need to pay for right-of-way. And since people do not live or work in parks, if a highway is built on parkland no one will have to leave his home or give up his business. Such factors are common to substantially all highway construction. *Thus, if Congress intended these factors to be on an equal footing with preservation of parkland there would have been no need for the statutes.* (Emphasis added.)

Congress clearly did not intend that cost and disruption of the community were to be ignored[27] by the Secretary.[28] *But the very existence of the statutes*[29] *indi-*

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[25] See n. 15, *supra.*

[26] See 114 Cong. Rec. 24037 (statement by Sen. Yarborough).

[27] See, *e.g.*, S. Rep. No. 1340, 90th Cong., 2d Sess., 18-19; H. R. Rep. No. 1584, 90th Cong., 2d Sess., 12.

[28] The legislative history indicates that the Secretary is not to limit his consideration to information supplied by state and local officials but is to go beyond this information and reach his own independent decision. 114 Cong. Rec. 24036-24037.

[29] The legislative history of both § 4 (f) of the Department of Transportation Act, 49 U. S. C. § 1653 (f) 1964 ed., Supp. V), and § 138 of the Federal-Aid Highway Act, 23 U. S. C. § 138 (1964 ed., Supp. V), is ambiguous. The legislative committee reports tend to support respondents' view that the statutes are merely general directives to the Secretary requiring him to con-

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cates that protection of parkland was to be given paramount (413) *importance.* The few green havens that are public parks were not to be lost unless there were truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reached extraordinary magnitudes. If the statutes are to have any meaning, the Secretary cannot approve the destruction of parkland unless he finds that alternative routes present unique problems. (Emphasis added.)

Plainly there is "law to apply" and thus the exemption for action "committed to agency discretion" is inapplicable. But the existence of judicial review is only the start: the standard for review must also be determined. For that we must look to § 706 of the Administrative Procedure Act, 5 U. S. C. § 706 (1964 ed., Supp. V), which provides that a "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found" not to meet six separate standards.[30] In all cases

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sider the importance of parkland as well as cost, community disruption, and other factors. See, *e.g.*, S. Rep. No. 1340, 90th Cong., 2d Sess., 19; H. R. Rep. No. 1584, 90th Cong., 2d Sess., 12. Statements by proponents of the statutes as well as the Senate committee report on § 4 (f) indicate, however, that the Secretary was to have limited authority. See *e.g.*, 114 Cong. Rec. 24033-24037; S. Rep. No. 1659, 89th Cong., 2d Sess., 22. See also H. R. Conf. Rep. No. 2236, 89th Cong., 2d Sess., 25. Because of this ambiguity it is clear that we must look primarily to the statutes themselves to find the legislative intent.

[30] "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

"(1) compel agency action unlawfully withheld or unreasonably delayed; and

"(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

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agency action must be set aside if the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or if the action failed to meet statutory, procedural, or constitutional requirements. 5 U. S. C. §§ 706 (2) (A), (B), (C), (D) (1964 ed., Supp. V). In certain narrow, specifically limited situations, the (414) agency action is to be set aside if the action was not supported by "substantial evidence." And in other equally narrow circumstances the reviewing court is to engage in a *de novo* review of the action and set it aside if it was "unwarranted by the facts." 5 U. S. C. §§ 706 (2) (E), (F) (1964 ed., Supp. V). (Emphasis added.)

Petitioners argue that the Secretary's approval of the construction of I—40 through Overton Park is subject to one or the other of these latter two standards of limited applicability. First, they contend that the "substantial evidence" standard of § 706 (2) (E) must be applied. In the alternative, they claim that § 706 (2) (F) applies and that there must be a *de novo* review to determine if the Secretary's action was "unwarranted by the facts." Neither of these standards is, however, applicable.

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(B) contrary to constitutional right, power, privilege, or immunity;

"(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

"(D) without observance of procedure required by law;

"(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

"(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

"In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error." 5 U. S. C. § 706 (1964 ed., Supp. V).

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Review under the substantial-evidence test is authorized only when the agency action is taken pursuant to a rulemaking provision of the Administrative Procedure Act itself, 5 U. S. C. § 553 (1964 ed., Supp. V), or when the agency action is based on a public adjudicatory hearing. See 5 U. S. C. §§ 556, 557 (1964 ed., Supp. V). The Secretary's decision to allow the expenditure of federal funds to build I—40 through Overton Park was plainly not an exercise of a rulemaking function. See 1 K. Davis, Administrative Law Treatise § 5.01 (1958). And the only hearing that is required by either the Administrative Procedure Act or the statutes regulating the distribution (415) of federal funds for highway construction is a public hearing conducted by local officials for the purpose of informing the community about the proposed project and eliciting community views on the design and route. 23 U. S. C. § 128 (1964 ed., Supp. V). The hearing is nonadjudicatory, quasi-legislative in nature. It is not designed to produce a record that is to be the basis of agency action—the basic requirement for substantial-evidence review. See H. R. Rep. No. 1980, 79th Cong., 2d Sess.

Petitioners' alternative argument also fails. *De novo* review of whether the Secretary's decision was "unwarranted by the facts" is authorized by § 706 (2) (F) in only two circumstances. First, such *de novo* review is authorized when the action is adjudicatory in nature and the agency factfinding procedures are inadequate. And, there may be independent judicial factfinding when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action. H. R. Rep. No. 1980, 79th Cong., 2d Sess. Neither situation exists here.

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Even though there is no *de novo* review in this case and the Secretary's approval of the route of I—40 does not have ultimately to meet the substantial-evidence test, the generally applicable standards of § 706 require the reviewing court to engage in a substantial inquiry. Certainly, the Secretary's decision is entitled to a presumption of regularity. See, *e.g., Pacific States Box & Basket Co.* v. *White,* 296 U. S. 176, 185 (1935); *United States* v. *Chemical Foundation,* 272 U. S. 1, 14-15 (1926). But that presumption is not to shield his action from a thorough, probing, in-depth review.

The court is first required to decide whether the Secretary acted within the scope of his authority. *Schilling* v. *Rogers,* 363 U. S. 666, 676-677 (1960). This determination naturally begins with a delineation of the scope of (416) the Secretary's authority and discretion. L. Jaffe, Judicial Control of Administrative Action 359 (1965). As has been shown, Congress has specified only a small range of choices that the Secretary can make. Also involved in this initial inquiry is a determination of whether on the facts the Secretary's decision can reasonably be said to be within that range. The reviewing court must consider whether the Secretary properly construed his authority to approve the use of parkland as limited to situations where there are no feasible alternative routes or where feasible alternative routes involve uniquely difficult problems. And the reviewing court must be able to find that the Secretary could have reasonably believed that in this case there are no feasible alternatives or that alternatives do involve unique problems.

Scrutiny of the facts does not end, however, with the determination that the Secretary has acted within the scope of his statutory authority. Section 706 (2) (A) requires a finding that the actual choice made was not

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"arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U. S. C. §706 (2)(A) (1964 ed., Supp. V). To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Jaffe, *supra,* at 182. See *McBee* v. *Bomar,* 296 F.2d 235, 237 (CA6 1961); *In re Josephson,* 218 F.2d 174, 182 (CA1 1954); *Western Addition Community Organization* v. *Weaver,* 294 F. Supp. 433 (ND Cal. 1968). See also *Wong Wing Hang* v. *Immigration and Naturalization Serv.,* 360 F.2d 715, 719 (CA2 1966). Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

(417)

The final inquiry is whether the Secretary's action followed the necessary procedural requirements. Here the only procedural error alleged is the failure of the Secretary to make formal findings and state his reason for allowing the highway to be built through the park.

Undoubtedly, review of the Secretary's action is hampered by his failure to make such findings, but the absence of formal findings does not necessarily require that the case be remanded to the Secretary. Neither the Department of Transportation Act nor the Federal-Aid Highway Act requires such formal findings. Moreover, the Administrative Procedure Act requirements that there be formal findings in certain rulemaking and adjudicatory proceedings do not apply to the Secretary's action here. See 5 U. S. C. §§ 553 (a) (2), 554 (a) (1964 ed., Supp. V). And, although formal findings may be required in some cases in the absence of statutory directives when the nature of the agency action is ambiguous, those situations are rare. See *City of Yonkers* v. *United States,*

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320 U. S. 685 (1944); *American Trucking Assns.* v. *United States,* 344 U. S. 298, 320 (1953). Plainly, there is no ambiguity here; the Secretary has approved the construction of I—40 through Overton Park and has approved a specific design for the project.

Petitioners contend that although there may not be a statutory requirement that the Secretary make formal findings and even though this may not be a case for the reviewing court to impose a requirement that findings be made, Department of Transportation regulations require them. This argument is based on DOT Order 5610.1,[31] which requires the Secretary to make formal (418) findings when he approves the use of parkland for highway construction but which was issued after the route for I—40 was approved.[32] Petitioners argue that even though the order was not in effect at the time approval was given to the Overton Park project and even though the order was not intended to have retrospective effect the order represents the law at the time of this Court's decision and under *Thorpe* v. *Housing Authority,* 393 U. S. 268, 281-282 (1969), should be applied to this case.

The *Thorpe* litigation resulted from an attempt to evict a tenant from a federally funded housing project under circumstances that suggested that the eviction was prompted by the tenant's objections to the management of the project. Despite repeated requests, the Housing Authority would not give an explanation for its action. The tenant claimed that the eviction interfered with her

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[31] The regulation was promulgated pursuant to Executive Order 11514, dated March 5, 1970, 35 Fed. Reg. 4247, which instructed all federal agencies to initiate procedures needed to direct their policies and programs toward meeting national environmental goals.

[32] DOT Order 5610.1 was issued on October 7, 1970.

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exercise of First Amendment rights and that the failure to state the reasons for the eviction and to afford her a hearing denied her due process. After denial of relief in the state courts, this Court granted certiorari "to consider whether [the tenant] was denied due process by the Housing Authority's refusal to state the reasons for her eviction and to afford her a hearing at which she could contest the sufficiency of those reasons." 393 U. S., at 272.

While the case was pending in this Court, the Department of Housing and Urban Development issued regulations requiring Housing Authority officials to inform tenants of the reasons for an eviction and to give a tenant the opportunity to reply. The case was then remanded to the state courts to determine if the HUD regulations were applicable to that case. The state court held them not to be applicable and this Court reversed on the (419) ground that the general rule is "that an appellate court must apply the law in effect at the time it renders its decision." 393 U. S., at281.

While we do not question that DOT Order 5610.1 constitutes the law in effect at the time of our decision, we do not believe that *Thorpe* compels us to remand for the Secretary to make formal findings.[33] Here, unlike the situation in *Thorpe*, there has been a change in circumstances—additional right-of-way has been cleared and the 26-acre right-of-way inside Overton Park has been purchased by the State. Moreover, there is an administra-

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[33] Even if formal findings by the Secretary were mandatory, the proper course would be to remand the case to the District Court directing that court to order the Secretary to make formal findings. See R. Robertson & F. Kirkham, Jurisdiction of the Supreme Court of the United States § 446, p. 929 (R. Wolfson & P. Kurland ed. 1951). Of course, the District Court is not prohibited from remanding the case to the Secretary. See *infra*, at 420.

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tive record that allows the full, prompt review of the Secretary's action that is sought without additional delay which would result from having a remand to the Secretary.

That administrative record is not, however, before us. The lower courts based their review on the litigation affidavits that were presented. These affidavits were merely *"post hoc"* rationalizations, *Burlington Truck Lines* v. *United States*, 371 U. S. 156, 168-169 (1962), which have traditionally been found to be an inadequate basis for review. *Burlington Truck Lines* v. *United States, supra; SEC* v. *Chenery Corp.*, 318 U. S. 80, 87 (1943). And they clearly do not constitute the "whole record" compiled by the agency: the basis for review required by § 706 of the Administrative Procedure Act. See n. 30, *supra*.

(420)

Thus it is necessary to remand this case to the District Court for plenary review of the Secretary's decision. That review is to be based on the full administrative record that was before the Secretary at the time he made his decision.[34] But since the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence it may be necessary for the District Court to require some explanation in order to determine if the Secretary acted within the scope of his authority and if the Secretary's action was justifiable under the applicable standard.

The court may require the administrative officials who participated in the decision to give testimony explaining their action. Of course, such inquiry into the mental processes of administrative decisionmakers is usually to be avoided. *United States* v. *Morgan*, 313 U. S. 409, 422

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[34] The Solicitor General now urges that in order to avoid additional delay the proper course is to remand the case to the District Court for review of the full administrative record.

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(1941). And where there are administrative findings that were made at the same time as the decision, as was the case in *Morgan,* there must be a strong showing of bad faith or improper behavior before such inquiry may be made. But here there are no such formal findings and it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves. See *Shaughnessy* v. *Accardi,* 349 U. S. 280 (1955).

The District Court is not, however, required to make such an inquiry. It may be that the Secretary can prepare formal findings including the information required by DOT Order 5610.1 that will provide an adequate explanation for his action. Such an explanation will, to some extent, be a "*post hoc* rationalization" and thus must be viewed critically. If the District Court decides (421) that additional explanation is necessary, that court should consider which method will prove the most expeditious so that full review may be had as soon as possible.

Reversed and remanded.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

Separate opinion of MR. JUSTICE BLACK, with whom MR. JUSTICE BRENNAN joins.

I agree with the Court that the judgment of the Court of Appeals is wrong and that its action should be reversed. I do not agree that the whole matter should be remanded to the District Court. I think the case should be sent back to the Secretary of Transportation. It is apparent from the Court's opinion today that the Secretary of Transportation completely failed to comply with the duty imposed upon him by Congress not to permit

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a federally financed public highway to run through a public park "unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park . . . ." 23 U. S. C. § 138 (1964 ed., Supp. V); 49 U. S. C. § 1653 (f) (1964 ed., Supp. V). That congressional command should not be taken lightly by the Secretary or by this Court. It represents a solemn determination of the highest law-making body of this Nation that the beauty and health-giving facilities of our parks are not to be taken away for public roads without hearings, factfindings, and policy determinations under the supervision of a Cabinet officer—the Secretary of Transportation. The Act of Congress in connection with other federal highway aid legislation,[1] it seems to me, (422) calls for hearings—hearings that a court can review, hearings that demonstrate more than mere arbitrary defiance by the Secretary. Whether the findings growing out of such hearings are labeled "formal" or "informal" appears to me to be no more than an exercise in semantics. Whatever the hearing requirements might be, the Department of Transportation failed to meet them in this case. I regret that I am compelled to conclude for myself that, except for some too-late formulations, apparently coming from the Solicitor General's office, this record contains not one word to indicate that the Secretary raised even a finger to comply with the command of Congress. It is our duty, I believe, to remand this whole matter back to the Secretary of Transportation for him to give this matter the hearing it deserves in full good-faith obedience to the Act of Congress. That Act was obviously passed to protect our public parks from forays by road builders except in the most extraordinary

[1] See 23 U. S. C. § 128 (1964 ed., Supp. V) and regulations promulgated thereunder, 34 Fed. Reg. 727-730 (1969).

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and imperative circumstances.[2] This record does not demonstrate the existence of such circumstances. I dissent from the Court's failure to send the case back to the Secretary, whose duty has not yet been performed.

MR. JUSTICE BLACKMUN.

I fully join the Court in its opinion and in its judgment. I merely wish to state the obvious: (1) The case comes to this Court as the end product of more than a decade of endeavor to solve the interstate highway problem at Memphis. (2) The administrative decisions under attack here are not those of a single Secretary; some were made by the present Secretary's predecessor and, before him, by the Department of Commerce's Bureau of Public (423) Roads. (3) The 1966 Act and the 1968 Act have cut across former methods and here have imposed new standards and conditions upon a situation that already was largely developed.

This undoubtedly is why the record is sketchy and less than one would expect if the project were one which had been instituted after the passage of the 1966 Act.

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[2] See also *Named Individual Members of the San Antonio Conservation Society* v. *Texas Highway Department*, 400 U. S. 968, 972 (1970) (dissents from the denial certiorari).

EXHIBIT 14

Statute Involved

Sec. 810 of the Merchant Marine Act, 1936, 46 U. S. C. 1227 provides so far as pertinent:

> "It shall be unlawful for any contractor receiving an operating-differential subsidy under sections 1171-1182 of this title for any charterer of vessels under sections 1191-1204 of this title to continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert wtih another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.
>
> No payment or subsidy of any kind shall be paid directly or indirectly out of funds of the United States or any agency of the United States to any contractor or charterer who shall violate this section."

SUPREME COURT, U. S.

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No. 73-229

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

MARSHALL P. SAFIR,

Petitioner,

v.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI FOR RESPONDENT BLOOMFIELD STEAMSHIP COMPANY

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI FOR RESPONDENT BLOOMFIELD STEAMSHIP COMPANY

Bloomfield Steamship Company, a party to the Maritime Subsidy Board proceeding which underlies this matter and to the proceeding in the Court of Appeals for the Second Circuit, review of which is sought here, opposes the petition for a writ of certiorari.[1] The Court

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[1] Although petitioner failed to name Bloomfield Steamship Company a respondent in his petition for certiorari, it is properly a party under this Court's Rule 21(4).

below in refusing to review a decision of the Maritime Subsidy Board which is not final, and which is not reviewable in the first instance in a Court of Appeals, has not departed from the "accepted and usual course of judicial proceedings;" its judgment does not conflict with any decision in another circuit; and the case presents no issue of public importance.

OPINIONS BELOW

Petitioner requested review of a Maritime Subsidy Board order (App. 15a)[2] by his "motion" filed directly in the Court of Appeals. The motion was denied by order of the Court of Appeals on May 16, 1973 (App. 1a).[3]

JURISDICTION

The Court of Appeals order was entered on May 16, 1973; the petition for a writ of certiorari was filed on August 2, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1970).

STATUTE INVOLVED

Section 810 of the Merchant Marine Act of 1936, 46 U.S.C. §1227 (1970) (App. 197a).

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[2]References to App. are to petitioner's bound Appendix.

[3]Other aspects of this litigation have been reported in Safir v. Gulick, 297 F. Supp. 630 (E.D.N.Y.), rev'd, sub nom. Safir v. Gibson, 417 F.2d 972 (2nd Cir. 1969); Safir v. Gibson, 432 F.2d 137 (2nd Cir.), certiorari denied, 400 U.S. 850 (1970); Safir v. Gibson, 330 F. Supp. 225 (E.D.N.Y. 1971); and Safir v. Blackwell, 469 F.2d 1061 (2nd Cir. 1972).

QUESTIONS PRESENTED

The questions presented are (1) whether an order of the Maritime Subsidy Board is subject to review in the first instance in a Court of Appeals and (2) if so, whether review is premature where (a) the order is not a final order and (b) the parties have not been given the opportunity to exercise their right of administrative appeal to the Secretary of Commerce.

COUNTERSTATEMENT OF THE CASE

The Maritime Subsidy Board initiated a proceeding, Docket S-243,[4] on October 24, 1969 to investigate whether Section 810 of Merchant Marine Act, 1936 (46 U.S.C. §1227) had been violated and, if so, the appropriate action which should be taken.[5] Nine shipping lines, including Bloomfield Steamship Co., were named parties, along with Sapphire Steamship Lines, Inc., and its original owners Marshall Safir and Arnold Weissberger. The nine shipping lines (1) held operating subsidy contracts during the eleven-month period in question and (2) were members of AGAFBO (an association of US-flag

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[4] Administration of the Merchant Marine Act, 1936 rests with the Secretary of Commerce, Department of Commerce Reorganization Plan No. 7 of 1961 (75 Stat. 840, 26 Fed. Reg. 7315 [1961]), who has delegated a part of these functions to the Maritime Subsidy Board. Department of Commerce Organization Order No. 10-8 (37 Fed. Reg. 15179 [1972]).

[5] Section 810 makes it unlawful for carriers holding operating subsidy contracts to "continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other U.S. carrier operating U.S. vessels on a U.S. trade route." The penalty for engaging in such conduct may be the forfeiture of subsidy.

carriers organized to negotiate with the Government about military cargo). The investigation is focused on whether these carriers violated Section 810 when AGAFBO reduced rates on military cargo to meet rates offered by Sapphire Steamship Lines, Inc., and if so, whether, and to what extent each carrier should be penalized.

The proceeding before the Board has not been completed. On April 16, 1973, the Maritime Subsidy Board issued an "Opinion and Order" making preliminary determinations. The Board required additional data from the carriers so that it could decide what penalties it should order. It deferred a final decision in the case until the submissions are considered. Thus, the order states:

> "Trade respondents, and public counsel as it deems necessary, are to submit on or before May 16, 1973, their views and supporting documentation on the exact ODS amounts recoverable for violation of Section 810 consistent with the decision herein. Any replies to such submission are to be filed within 10 days after service of such submission. An order determining final recoveries will thereafter be issued. Upon issuance of said order on final recoveries this decision will become final." (App. 87a)[6]

The parties' views on recoveries have been submitted to the Board; a final decision in the case is imminent.

Shortly after the Board's Order of April 16, 1973 was issued, petitioner went directly to the Court of Appeals

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[6]In response to an inquiry from Public Counsel, the Board confirmed that its decision of April 16, 1973 was not a final determination of the issues. Letter from James S. Dawson, Jr., Secretary, Maritime Subsidy Board to Michael J. McMorrow, May 8, 1973 (App. 10a). This letter states that the order lacks finality and cannot yet be appealed to the Secretary of Commerce, under agency regulations.

for the Second Circuit and filed a "motion" pro se asking that the Board's decision be set aside and the Court increase the penalties on the nine carriers. The Government and the carriers moved to dismiss that "motion" because a Maritime Subsidy Board order is not directly reviewable in the Court of Appeals and because any such review is premature. The order denying petitioner's "motion" was issued on May 16, 1973 (App. 1a).

ARGUMENT

The Court of Appeals properly refused to review the Maritime Subsidy Board order. Its action accords with well-established legal principles of this Court, and the Courts of Appeal, and raises no issue of public importance.

I.

PETITIONER IMPROPERLY SOUGHT REVIEW IN THE COURT OF APPEALS

Petitioner attempted to review a Maritime Subsidy Board decision directly in the Court of Appeals for the Second Circuit—a court lacking jurisdiction to review that agency's orders. The jurisdiction of the Court of Appeals is statutory. *United States v. Agne*, 161 F.2d 331, 332 (3rd Cir. 1947). As this Court has explained:

> "The Court of Appeals for the District of Columbia, like the several circuit courts of appeals, is without the jurisdiction over original suits conferred on district courts.... Such jurisdiction as it has, to review directly the action of administrative agencies, is specially conferred by legislation relating specifically to the determinations of such agencies made subject to review, and prescribing the manner and extent of the review."

American Federation of Labor v. National Labor Relations Board, 308 U.S. 401, 404 (1940). In the absence of a specific statutory provision for review of administrative action in the first instance, the Court of Appeals lacks jurisdiction. See *Arizona Department of Public Works v. HEW,* 449 F.2d 456, 464 (9th Cir.), certiorari denied 405 U.S. 919 (1971); *Robertson v. F.T.C.,* 415 F.2d 49, 54-55 (4th Cir. 1969); *Rettinger v. F.T.C.,* 392 F.2d 454, 456-7 (2d Cir. 1968); *Turkel v. Food and Drug Administration,* 334 F.2d 844, 846 (8th Cir. 1964); *Schwab v. Quesada,* 284 F.2d 140, 143 (3rd Cir. 1960); *City of Dallas, Texas v. Rentzel,* 172 F.2d 122, 123 (5th Cir. 1949), certiorari denied 338 U.S. 858 (1949).

There is no statutory authorization for judicial review of Maritime Subsidy Board decisions under the Merchant Marine Act, 1936 directly to the Courts of Appeal. Petitioner should first seek judicial review of the agency's decision in the district courts. See, e.g., *Sea-Land Service, Inc. v. Connor,* 418 F.2d 1142 (D.C. Cir. 1970); *American Mail Line, Ltd. v. Gulick,* 411 F.2d 696 (D.C. Cir. 1969); *United States v. Marietta Manufacturing Co.,* 268 F. Supp. 176 (S.D. W.Va. 1967); *American President Lines, Ltd. v. Federal Maritime Board,* 112 F. Supp. 346 (D. D.C. 1953). See also *Safir v. Gulick,* 297 F. Supp. 630 (EDNY) reversed sub. nom *Safir v. Gibson,* 417 F.2d 972 (2d Cir. 1969); *Safir v. Gibson,* 432 F.2d 137 (2d Cir.), certiorari denied 400 U.S. 850 (1970); and *Safir v. Gibson,* 330 F. Supp. 225 (EDNY 1971) (where petitioner sought and secured review of Board action in the district court).

II.

PETITIONER SEEKS REVIEW PREMATURELY

Petitioner has attempted to review the Maritime Subsidy Board's decision in Docket S-243, before the agency has made its final decision in the case. The agency's Order of April 16, 1973 discusses the possible liability of various parties for subsidy refunds under Section 810 of the Act and instructs the parties to make additional submissions. A final decision is deferred until these submissions are considered.[7] Yet, petitioner asks this Court to grant a writ of certiorari to determine whether the Maritime Administration has made a proper determination with respect to subsidy recoveries when it has never made any final determination on these penalties at all.

The Court of Appeals in denying petitioner's "motion" for review, at this time, acted in accordance with long-standing judicial precedent. This Court has emphasized that the courts should not interfere with an administrative agency until it has completed its action. See *McKart v. United States*, 395 U.S. 185, 194 (1969). The Administrative Procedure Act, 5 U.S.C.A. §704 provides for judicial review of "final action"; review of preliminary, procedural, or intermediate "agency action" is deferred. Judicial review is deferred to permit the administrative process to proceed in an orderly manner. It awaits a time when rights or obligations are established or legal consequences flow from the agency action. See

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[7]The Order of April 16, 1973 states this plainly: "Upon issuance of said orders on final recoveries this decision will become final." (App. 87a)

Port of Boston Marine Terminal Assoc. v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71 (1970).[8]

Petitioner has requested review of the Maritime Subsidy Board's determination of subsidy recovery before the Board has fixed such penalties—before any rights or obligations are established, or legal consequences can result. If granted, such review would disrupt the last stages of the agency proceeding. Moreover, in prematurely seeking review, petitioner is foreclosing other parties from seeking review by the Secretary of Commerce. Under agency regulations, the Secretary may review Maritime Subsidy Board decisions either on his own motion or on the basis of a petition filed by a party.[9] But, as the Secretary of the Maritime Subsidy Board has confirmed, until the Board decision in Docket S-243 is made final, none of the parties may seek Secretarial review. Petitioner's attempt to short-circuit the ordinary review process deprives the parties, as well as the Secretary of Commerce, of important rights. The Court of Appeals properly refrained from untimely interference in the agency process. *Toilet Goods Association v. Gardner,* 387 U.S. 158, 162-165 (1967); *Sea-Land Service, Inc. v. Federal Maritime Commission,* 402 F.2d 631 (D.C. Cir. 1968).

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[8]For example, in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), heavily relied upon by petitioner, review was sought of the Secretary's decision committing federal funds to build a highway. The agency process had run its course; and the resulting action had direct legal consequences. The case is otherwise inapposite.

[9]46 CFR §202.1 setting forth Section 6 of Department Order 117A. The parties have a right to seek review by the Secretary of Commerce whether or not such an appeal is "discretionary" in the sense that a party need not seek Secretarial review prior to seeking judicial review of a final Board order under 5 U.S.C.A. §704.

CONCLUSION

For these reasons the petition for certiorari should be denied.

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IN THE

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OCTOBER TERM, 1973

MARSHALL P. SAFIR, PETITIONER

v.

ROBERT W. BLACKWELL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS AMERICAN EXPORT LINES, INC.; LYKES BROS. STEAMSHIP CO., INC.; MOORE-McCORMACK LINES, INCORPORATED; AND UNITED STATES LINES, INC.

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OPINIONS BELOW

The Court of Appeals did not render an opinion; its order of May 16, 1973 denying petitioner's "motion to recall mandate" (App. 1a)[1] is not reported. There is no district court opinion, petitioner having sought judicial

[1] "App." refers to the separately bound appendix which accompanied the petition for certiorari.

review directly in the court of appeals. The opinion of the Maritime Subsidy Board, U.S. Department of Commerce (App. 15a), is reported at 13 Pike & Fischer Shipping Regulation Reports ("SRR") 809 (April 16, 1973).[2]

JURISDICTION

The order of the court of appeals was entered on May 16, 1973. The petition for a writ of certiorari was filed on August 2, 1973. The Court's jurisdiction is invoked under 28 U.S.C. §1254(1) (1970).

STATUTE INVOLVED

Section 810 of the Merchant Marine Act, 1936, 46 U.S.C. §1227 (1970), provides:

> It shall be unlawful for any contractor receiving an operating-differential subsidy under title VI or for any charterer of vessels under title VII of this Act, to continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.

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[2]Other aspects of this litigation have been reported in Safir v. Gulick, 297 F. Supp. 630 (E.D.N.Y.). rev'd, *sub nom.* Safir v. Gibson, 417 F.2d 972 (2nd Cir. 1969); Safir v. Gibson, 432 F.2d 137 (2nd Cir.), certiorari denied, 400 U.S. 850 (1970); Safir v. Gibson, 330 F. Supp. 225 (E.D.N.Y. 1971); and Safir v. Blackwell, 469 F.2d 1061 (2nd Cir. 1972).

> No payment or subsidy of any kind shall be paid directly or indirectly out of funds of the United States or any agency of the United States to any contractor or charterer who shall violate this section. Any person who shall be injured in his business or property by reason of anything forbidden by this section may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

QUESTIONS PRESENTED

1. Whether, in the absence of a statute conferring jurisdiction on the courts of appeals to review Maritime Subsidy Board decisions directly, the United States Court of Appeals for the Second Circuit was the proper court of first instance to review a decision of that Board.

2. If the answer to the first question is yes, whether a Maritime Subsidy Board decision which is not final was ripe for judicial review.

STATEMENT

This matter stems from an investigation by respondents Blackwell, *et al.*, acting as the Maritime Subsidy Board in the Department of Commerce,[3] to determine

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[3]Congress initially vested responsibility for administration of the Merchant Marine Act, 1936, in the United States Maritime Commission. Reorganization Plan No. 21 of 1950 (64 Stat. 1273, 15 Fed. Reg. 3178 (1950)) transferred the Commission's functions to the Federal Maritime Board and the Maritime Administration, Department of Commerce. Reorganization Plan No. 7 of 1961 (75 Stat. 840, 26 Fed. Reg. 7315 (1961)) transferred these functions

whether steamship companies receiving "operating-differential subsidies" under the Merchant Marine Act, 1936,[4] violated Section 810 of that Act.[5] Section 810 forbids subsidized operators from being party to agreements or engaging in practices with other ocean common carriers which are "unjustly discriminatory or unfair" to other American-flag steamship operators. The penalty for such conduct may be the forfeiture of subsidy.[6]

The investigation, known as Docket No. S-243, focused on tariff rate reductions by the Atlantic and Gulf American-Flag Operators ("AGAFBO"), a conference of nineteen subsidized and unsubsidized steamship com-

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to the Secretary of Commerce, who subdelegated them in part to the Maritime Administration and in part to an *ex officio* Maritime Subsidy Board within that Administration. Department of Commerce Order No. 117 (26 Fed. Reg. 7713 (1961)), as amended, Department of Commerce Organization Order No. 10-8 (37 Fed. Reg. 15179 (1972)). (The 1961 reorganization also created a Federal Maritime Commission and gave it functions not here relevant.)

[4] 46 U.S.C. §§1101 *et seq.* (1970). In substance, Title VI of the 1936 Act, 46 U.S.C. §§1171-1183, authorizes the government to contract with American Steamship Lines to provide regular shipping services for a 20-year period over essential U.S. foreign trade routes with modern American ships manned by American crews; in exchange the lines are paid the difference between their operating costs using those American vessels and American crews and the lower operating costs of their foreign-flag competitors, *i.e.*, the "operating-differential." See *Moore-McCormack Lines, Inc. v. United States*, 188 Ct. Cl. 644, 650, 413 F.2d 568, 571 (1969); *Pacific Far East Line, Inc. v. United States*, 184 Ct. Cl. 169, 394 F.2d 990 (1968).

[5] 46 U.S.C. §1227 (1970).

[6] Section 810 also gives the injured operator a treble damage remedy patterned after the antitrust laws. This is not involved in this case.

panies whose membership included the four respondents joining in this brief, American Export Lines, Inc., Lykes Bros. Steamship Co., Inc., Moore-McCormack Lines, Incorporated, and United States Lines, Inc. For eleven months in 1965-1966, AGAFBO had reduced its rates for the transportation of military cargo and military household goods to match those offered by Sapphire Steamship Lines, Inc., a non-conference American-flag operator. The issue before the Board was whether the subsidized carriers' participation in that rate reduction violated Section 810 of the 1936 Act and, if so, whether penalties should be imposed therefor. Petitioner, an officer and stockholder of Sapphire, these four respondents, and other steamship companies were parties to that administrative proceeding (App. 16a).

The Board issued a preliminary decision on April 16, 1973, concluding that the subsidized companies had violated Section 810. (App. 15a-87a).[7] It determined, however, that only the lines which competed with Sapphire for cargo at the reduced rates—the so-called "trade" lines (including these respondents)—should be penalized by repaying portions of the subsidy they received during the period in question, the precise amounts to be calculated under a formula based on the volume of military cargo carried at the reduced rates. The sums subject to repayment under that formula were substantial (App. 86a-87a), and the Board afforded respondents opportunity to review the basis of its preliminary determinations (App. 87a):

> Trade respondents, and Public Counsel as he deems necessary, are to submit on or before May 16,

[7] The Board's decision was based on a record developed in a proceeding before one of its administrative law judges. See App. 18a-19a.

> 1973, their views and supporting documentation on the exact [operating-differential subsidy] amounts recoverable for violation of Section 810 consistent with the decision herein. Any replies to such submissions are to be filed within ten days after service of such submissions. An order determining final recoveries will thereafter be issued. *Upon issuance of said order on final recoveries this decision will become final.* [Emphasis added.]

Eleven days later on April 27, 1973, without awaiting a final Board decision, petitioner *pro se* filed a "motion" in the Second Circuit to overturn the Board's action and require the imposition of greater sanctions on all respondents. Respondents moved to dismiss that "motion" on the ground that it was outside the court of appeals' jurisdiction and premature. The court denied petitioner the relief requested on May 16, 1973 (App. 1a). The petition for a writ of certiorari seeks review of that denial.[8]

ARGUMENT

The court of appeals declined to entertain petitioner's request to review a preliminary decision of the Maritime Subsidy Board. The court's ruling is correct and consistent with decisions of this Court and other circuits; further review is therefore not warranted.

1. Petitioner sought judicial review of a Maritime Subsidy Board decision directly in the Second Circuit.

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[8] While not named in the petition for certiorari as respondents, the four steamship companies joining in this brief were parties to the underlying administrative proceeding and appeared to opposed petitioner's "motion" in the court whose judgment is sought to be reviewed. They are therefore proper parties in this Court under its Rule 21(4).

The jurisdiction of the court of appeals, however, is limited to that conferred by Congress; no statute authorizes that court to entertain such an action as an original matter and petitioner has cited none. The court of appeals, like this Court, "does not normally review orders of administrative agencies in the first instance." *C.A.B. v. American Air Transport*, 344 U.S. 4 (1952); *Arizona Department of Public Works v. H.E.W.*, 449 F.2d 456, 464 (9th Cir.), certiorari denied, 405 U.S. 919 (1971); *Robertson v. F.T.C.*, 415 F.2d 49, 54-55 (4th Cir. 1969); *Rettinger v. F.T.C.*, 392 F.2d 454, 456-457 (2d Cir. 1968); *Schwab v. Quesada*, 284 F.2d 140, 143 (3d Cir. 1960); *City of Dallas, Texas v. Rentzel*, 172 F.2d 122, 123 (5th Cir.), certiorari denied, 333 U.S. 858 (1949).

The court below therefore correctly declined to hear petitioner's cause at this time. While Subsidy Board decisions are not immune from judicial scrutiny, one seeking that review must follow the prescribed channels. These begin in the district court or the Court of Claims. See, *States Steamship Co. v. United States*, 192 Ct. Cl. 795, 482 F.2d 832 (1970); *Sea-Land Service, Inc. v. Connor*, 418 F.2d 1142 (D.C. Cir. 1969); *Pacific Far East Line, Inc. v. United States*, 184 Ct. Cl. 169, 394 F.2d 990 (1968); *Oceanic Steamship Co. v. United States*, 165 Ct. Cl. 217 (1964); *American President Lines v. Federal Maritime Board*, 133 F. Supp. 100 (D. D.C. 1955), *affirmed*, 235 F.2d 18 (D.C. Cir. 1956); *American President Lines v. Federal Maritime Board*, 112 F. Supp. 346 (D. D.C. 1953).

It is relevant at this point to note that petitioner is proceeding here *pro se*. On other occasions, when assisted by counsel, he has successfully obtained relief against the Board in suits initiated in the district court. See, *Safir v. Gulick*, 297 F. Supp. 630 (E.D.N.Y.), reversed *sub nom.*

Safir v. Gibson, 417 F.2d 972 (2d Cir. 1969); *Safir v. Gibson*, 432 F.2d 137 (2d Cir.), certiorari denied, 400 U.S. 850 (1970); and *Safir v. Gibson*, 330 F. Supp. 225 (E.D.N.Y. 1971).

2. An equally sound reason for the lower court's refusal to consider petitioner's "motion" is the interlocutory nature of the agency's action. Not only did the Board expressly state that its decision was not final, but it required the parties to submit evidence bearing on the computation of penalties in accordance with its preliminary decision. (See pp. 5-6, *ante*). This was no mere formality. Three respondents have submitted such evidence, which Public (government) Counsel has accepted, indicating that the subsidies subject to recovery were substantially overstated in the Board's preliminary decision. Should the Board agree, its final decision will differ significantly from the initial one. In addition, respondents are entitled to petition the Secretary of Commerce to review the Board's ultimate action and in all likelihood will do so. 46 C.F.R. §202.1 (1972 Rev.).

Section 10 of the Administrative Procedure Act contemplates judicial review only after "final agency action". 5 U.S.C. §703 (1970). This Court has held that "the relevant considerations in determining finality are whether the process of administrative decision making has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action." *Boston Marine Terminal Assoc. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970), and cases there cited. The Maritime Subsidy Board decision here involved is not "final" under that test. It does not affect any party's rights or obligations, no legal consequences flow from it, and judicial review at this stage would interrupt the Board in

the midst of preparing its final decision, which is expected imminently. Whatever limits there may be on the "finality" doctrine as applied to administrative agencies, the absence of a formalized administrative decision with concrete effect makes plain that this case is not "ripe" for judicial review. The court below therefore correctly refrained from judicial interference at this premature stage of the administrative process. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967); *Toilet Goods Association v. Gardner*, 387 U.S. 158, 162-165 (1967); *Sea-Land Service, Inc. v. Federal Maritime Commission*, 402 F.2d 631 (D.C. Cir. 1968).

3. Given the posture of the case, petitioner's substantive contentions are not material. Moreover, the court below has reviewed other aspects of this litigation on three previous occasions. It is therefore fair to state that its denial of relief was made in the context of a judicial appreciation of the issues in and status of the underlying administrative proceeding. See App. 142a, 152a, and 163a.[9]

~~proceeding. See App. 142a, 152a, and 163a~~.

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[9]Petitioner is mistaken in suggesting that the decision below conflicts with *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1970). That case did not involve the Merchant Marine Act, 1936, and the cited quotations from the Court's opinion (Pet. 6) address a claim of immunity from judicial review, an issue not present in this case. See page 7, *ante*.

CONCLUSION

For the reasons stated the petition for certiorari should be denied.

Respectfully submitted,

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September 4, 1973

SUPREME COURT OF U. S.

October Term, 1973

No. 73-[illegible]

MARSHALL P. SNYDER, *Petitioner*,

v.

ROBERT W. BLACKWELL, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF IN OPPOSITION FOR RESPONDENTS AMERICAN PRESIDENT LINES, LTD., PRUDENTIAL STEAMSHIP CO., INC., PRUDENTIAL-GRACE LINES, INC., AND FARRELL LINES, INC.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-229

MARSHALL P. SAFIR, *Petitioner,*

v.

ROBERT W. BLACKWELL, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF IN OPPOSITION FOR RESPONDENTS AMERICAN PRESIDENT LINES, LTD.; PRUDENTIAL STEAMSHIP CO., INC.; PRUDENTIAL-GRACE LINES, INC.; AND FARRELL LINES, INC.

OPINIONS BELOW

The Court of Appeals did not render an opinion but its order of May 16, 1973, which gave rise to the present petition, and the opinion and order of the Maritime Subsidy Board of the Department of Commerce, to which the Court's order relates, are set forth in the Appendix to the Petition ("Pet. App."). There is no

opinion or order of the District Court inasmuch as petitioner filed his motion with respect to the opinion and order of the Maritime Subsidy Board directly with the Court of Appeals.

The order of the Court of Appeals (Pet. App. 1a) is unreported. The opinion and order of the Maritime Subsidy Board (Pet. App. 15a-87a) is reported at 13 Pike & Fischer Shipping Regulation Reports 809 (April 16, 1973).[1]

JURISDICTION

The order of the Court of Appeals was entered on May 16, 1973. The present petition for a writ of certiorari was filed on August 3, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether in the absence of a statute conferring original jurisdiction on the courts of appeals to review orders of the Maritime Subsidy Board the United States Court of Appeals for the Second Circuit was the proper court in which to seek initial review of an order of that Board.

2. Whether an order of the Maritime Subsidy Board which by its express terms was not a final order and which did not finally determine a number of significant matters involved in the proceeding was ripe for judicial review.

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[1] Opinions of the District Court and the Court of Appeals dealing with other phases of this litigation are reported as follows: *Safir* v. *Gulick*, 297 F. Supp. 630 (E.D.N.Y.), *rev'd sub nom Safir* v. *Gibson*, 417 F.2d 972 (2d Cir. 1969); *Safir* v. *Gibson*, 432 F.2d 137 (2d Cir.), *cert. denied*, 400 U.S. 850 (1970); *Safir* v. *Gibson*, 330 F. Supp. 225 (E.D.N.Y. 1971); and *Safir* v. *Blackwell*, 469 F.2d 1061 (2d Cir. 1972).

STATEMENT

The present petition arises out of an investigation currently in progress by the Maritime Subsidy Board of the Department of Commerce to determine whether certain members of an approved shipping conference, Atlantic and Gulf American Flag Berth Operators (AGAFBO), violated Section 810 of the Merchant Marine Act, 1936, as amended, 46 U.S.C. Section 1227, and if so what action should be taken. Of the 19 lines which were members of AGAFBO, those involved in the investigation are all the subsidized members, including the four respondents represented herein (referred to in this proceeding as the "non-trade respondents") and five other carriers (referred to in this proceeding as the "trade respondents").

The investigation resulted from a complaint to the Maritime Subsidy Board and the Acting Maritime Administrator by Sapphire Steamship Lines, Inc., an ocean carrier, and its two stockholders, petitioner Marshall P. Safir and Arnold Weisberger, that the trade and non-trade respondents had violated Section 810 of the Merchant Marine Act, 1936, 46 U.S.C. Section 1227, during the period March 29, 1965 to March 1, 1966 by virtue of action of certain AGAFBO carriers in setting, filing and maintaining reduced rates on military cargo moving between U.S. Atlantic and Gulf Coast ports and ports in the Bordeaux-Hamburg and United Kingdom range, on which Sapphire operated. In the complaint Sapphire demanded that the Maritime Subsidy Board terminate all further subsidy payments to the subsidized members of AGAFBO and recover all subsidies paid to them since March 29, 1965.

Following litigation in the United States District Court for the Eastern District of New York and the

United States Court of Appeals for the Second Circuit respecting the nature of the proceeding before the Board, the Maritime Subsidy Board commenced the proceeding involved here, Docket S-243, by ordering a hearing. The Board's Chief Hearing Examiner (now Chief Administrative Law Judge) served a Recommended Decision in which he found that the trade respondents had violated Section 810, and should be required to repay various amounts of subsidy, but that the non-trade respondents—because they did not serve the Bordeaux Hamburg/United Kingdom trade to which the rate reductions applied, and had not set, filed, used, voted on or, under the AGAFBO agreement, been entitled to vote on the rates involved—had not violated Section 810. (Pet. App. 19a)

On exceptions to the Recommended Decision, the Board issued on April 16, 1973, an opinion and order in which it adopted the Chief Administrative Law Judge's finding of violation of Section 810 by the trade carriers, and his conclusion that substantial subsidies should be collected from them. The Board also found that the non-trade carriers had committed "technical" violation of Section 810 merely by continuing as members of AGAFBO during the period of illegal rate-making activity, but concluded that no repayment of subsidies should be sought from them in view of the purely technical nature of the violation by those carriers. (Pet. App. 38a)

Inasmuch as at the time it issued its opinion and order the Board needed additional documentation on which to base a determination of the final amounts of subsidy to be repaid by the various trade carriers, the Board expressly provided that its decision should not become final until such documentation had been sub-

mitted and an order on final recoveries issued. (Pet. App. 86a-87a). Such documentation has been submitted and it is anticipated that an order on final recoveries will be issued shortly.

On April 27, 1973, petitioner filed a motion directly with the Court of Appeals for the Second Circuit to set aside all findings and conclusions of the Board with respect to amounts of subsidy owed by all respondents and to order the Board to recover all operating-differential subsidies paid to all subsidized members of AGAFBO on account of all operations during the eleven month period of violation. (Pet. App. 119a-120a). The Court of Appeals denied this motion without opinion on May 16, 1973 (Pet. App. 1a), and on August 3, 1973, petitioner Marshall P. Safir filed the present petition.[2]

ARGUMENT

There has been no final action by the Maritime Subsidy Board, nor, even if there had been final action, has petitioner sought review in a court with jurisdiction to entertain the matter. In these circumstances, the Court of Appeals properly refused to intrude itself into the decisional process at this stage.

1. The action of the Court of Appeals denying petitioner's motion to reverse certain findings of the Maritime Subsidy Board was clearly correct.

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[2] Although petitioner did not name the respondents represented herein as parties in this Court, these respondents are parties to the proceeding before the Maritime Subsidy Board and participated in the proceeding before the Court of Appeals by filing a brief in opposition to petitioner's motion. Thus they are clearly parties respondent in this Court pursuant to Rule 21(4) of the Rules of this Court.

The Court of Appeals had no jurisdiction to consider the merits of petitioner's motion, which sought direct judicial review by the Court of Appeals of a decision of the Maritime Subsidy Board. Courts of appeals have only the jurisdiction conferred on them by statute and no statute gives them original jurisdiction to review orders of the Maritime Administration relating to subsidy matters. Such jurisdiction resides only in the district courts, see, e.g., *Sea-Land Service, Inc.* v. *Connor,* 418 F.2d 1142 (D.C. Cir. 1969), or, where a party is seeking a money judgment from the Government, in the Court of Claims, see, *e.g., States Steamship Co.* v. *United States,* 192 Ct. Cl. 795, 428 F.2d 832 (1970).

2. The opinion and order of the Maritime Subsidy Board was not ripe for judicial review. The provisions for judicial review of agency action in the Administrative Procedure Act contemplate that judicial review is available only after "final agency action." 5 U.S.C. § 704. The opinion and order of the Maritime Subsidy Board of April 16, 1973, was clearly not such a "final agency action." The terms of the order expressly provided that it should not become final until the Board was in a position to make its final determinations on amounts of subsidy to be recovered. A vital part of the Board's order remains to be completed and the Board, quite properly, provided that no portion of the order is to be regarded as final—and thus reviewable on a piecemeal basis—until the Board has completed its entire task. Indeed, once issued an order of the Board is subject to the provisions of Department of Commerce Order No. 10-8, 46 C.F.R. Section 202.1 (1972 Rev.) which provide for review of Board decisions by the Secretary of Commerce, either on the Secretary's

own motion or an application of a party to the Board proceeding.

3. The sole ground petitioner asserts for grant of the writ can be found in the claim that the decision of the Court of Appeals and the opinion and order of the Maritime Subsidy Board holding that the Maritime Administration has some discretion to determine the extent to which past subsidy payments should be recovered pursuant to Section 810 "is in direct conflict with the decision of the Supreme Court in *Citizens to Preserve Overton Park, Inc.* v. *Volpe.*" (389 U.S. 327; Pet. 6). As shown immediately above this substantive claim is not properly raised to this Court. But even if it were, it is patently without substance.

Overton held only that decisions of the Secretary of Transportation with respect to the use of federal funds to construct highways through public parks pursuant to Section 4(f) of the Department of Transportation Act of 1966, as amended, and Section 18(a) of the Federal-Aid Highway Act of 1968 are subject to judicial review pursuant to the standard for such review set forth in Section 706 of the Administrative Procedure Act, 5 U.S.C. § 706. Nothing in the action of the court below suggests an unwillingness to review actions or determinations of the Maritime Subsidy Board where properly put under review before it, and thus permit a claim of conflict with the holding of *Overton Park*. To the contrary, at an earlier stage of this proceeding, the Court of Appeals explicitly recognized the availability of judicial review of the ultimate decision of the Board in terms wholly consistent with those of the *Overton Park* decision. (Pet. App. 172a-173a)

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 73-229

In the Supreme Court of the United States

OCTOBER TERM, 1973

MARSHALL P. SAFIR, PETITIONER

v.

ROBERT W. BLACKWELL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-229

MARSHALL P. SAFIR, PETITIONER

v.

ROBERT W. BLACKWELL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioner, an owner of Sapphire Steamship Company, requested the Maritime Subsidy Board to recovery subsidies paid to certain named members of the Atlantic and Gulf American Flag Berth Operators (AGAFBO) for their violations of Section 810 of the Merchant Marine Act of 1936, 49 Stat. 2015, as amended, 46 U.S.C. 1227, by having acted in concert to reduce selected military cargo rates on certain routes in order to drive Sapphire from those routes (Pet. App. 16a-17a). The Maritime Subsidy Board then instituted an investigation to determine whether those members of AGAFBO receiving operating—differential subsidies under the Act had so violated Section 810.

On April 16, 1973, the Board issued a preliminary decision finding that all subsidized members of AGAFBO had violated Section 810, but that recovery of subsidies

was proper only from those who were in direct competition with Sapphire (Pet. App. 19a, 86a-87a). The exact amounts to be repaid were to be determined by a formula based on the volume of military cargo carried at reduced rates (Pet. App. 77a-78a), and those subject to the order to repay were given an opportunity to submit their views on the amounts recoverable (Pet. App. 87a). The order further stated (App. 87a):

> An order determining final recoveries will thereafter be issued. Upon issuance of said order on final recoveries this decision will become final.

Without awaiting the further proceedings called for by the order, or for a final decision, petitioner filed in the United States Court of Appeals for the Second Circuit a "motion" to overturn the Board's order and to require greater penalties from all respondents (Pet. App. 119a-120a).[1] The respondents opposed the motion and contended that the court of appeals lacked jurisdiction to conduct the judicial review sought by petitioner and that, in any event, such review was premature. The court of appeals denied petitioner's motion (Pet. App. 1a). Petitioner seeks review of that denial.

1. The court of appeals had no jurisdiction to review directly the order in question. Absent a specific statutory grant of jurisdiction to review orders of administrative

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[1] Petitioner's motion was filed under the caption of an earlier appeal in this unique and much-litigated matter in which the court of appeals had reversed a district court's dismissal of petitioner's complaint seeking to compel the federal respondents (or their predecessors) to institute proceedings of the type now being challenged by petitioner. *Safir* v. *Gibson*, 417 F. 2d 972 (C.A. 2). The conduct of those proceedings was also the subject of another district court challenge by petitioner and review by the court of appeals. *Safir* v. *Gibson*, 432 F. 2d 137 (C.A. 2), certiorari denied, 400 U.S. 850.

agencies, a court of appeals has no jurisdiction to entertain such an action as a court of first instance. *American Federation of Labor* v. *National Labor Relations Board,* 308 U.S. 401; *Turkel* v. *Food and Drug Administration,* 334 F. 2d 844 (C.A. 6), certiorari denied, 379 U.S. 990; *Schwab* v. *Quesada,* 284 F. 2d 140 (C.A. 3); *City of Dallas* v. *Rentzel,* 172 F. 2d 122 (C.A. 5), certiorari denied, 338 U.S. 858. There is no statute conferring such jurisdiction in this case.[2]

2. In any event, the decision of the Maritime Subsidy Board of which petitioner sought review was not a final order and thus was not ripe for review. The Board itself stated that the decision would become final only after an additional order was issued. The test for finality is "whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action." *Boston Marine Terminal Association* v. *Rederiaktiebobolaget Transatlantic,* 400 U.S. 62, 71. The Board's explicitly interlocutory decision in the instant case is not final under that test. No legal consequences flow from the order, no rights or obligations have been determined finally, and judicial review would disrupt the orderly functioning of the administrative process in this case.

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[2] Indeed, jurisdiction over suits brought to recover damages arising from unjustly discriminatory or unfair practices of subsidized carriers is vested in the district courts. 46 U.S.C. 1227. No further provision is made for review of decisions of the Martitime Subsidy Board. To the extent that the Administrative Procedure Act might permit review, such a review proceeding could be initiated only in the district court. See *Rettinger* v. *Federal Trade Commission,* 392 F. 2d 452, 457 (C.A. 2).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.

DOJ-1973-09

SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
SEP 26 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-229

MARSHALL P. SAFIR,

Petitioner,

—v.—

ROBERT W. BLACKWELL, Assistant Secretary of Commerce for Maritime Affairs, Successor to and Substituted for ANDREW GIBSON; JAMES S. DAWSON, JR., Secretary Maritime Subsidy Board and FREDERICK DENT, Secretary of Commerce, Successor to and Substituted for MAURICE STANS,

Respondents.

PETITIONER'S REPLY MEMORANDUM

MARSHALL P. SAFIR, *Pro se,*
41 Flatbush Avenue,
Brooklyn, N. Y. 11217
(212) 858-2700

September 26, 1973

IN THE

Supreme Court of the United States

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No. 73-229

MARSHALL P. SAFIR,

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ROBERT W. BLACKWELL, Assistant Secretary of Commerce for Maritime Affairs, Successor to and Substituted for ANDREW GIBSON; JAMES S. DAWSON, JR., Secretary Maritime Subsidy Board and FREDERICK DENT, Secretary of Commerce, Successor to and Substituted for MAURICE STANS,

Respondents.

PETITIONER'S REPLY MEMORANDUM

The Maritime Subsidy Board decision that Section 810, 46 U.S.C. 1227 was violated was the final outcome of an *original action* filed by this petitioner in the United States District Court for the Eastern District of New York, Docket No. 67c-643.

The Maritime Subsidy Board investigation which culminated in the finding of violation was not undertaken voluntarily but was mandated by the Court of Appeals reversal of the district court's (the court of first instance) decision denying plaintiff's standing to sue for governmental recovery of subsidies improperly paid in the past.

In reversing the lower Court the Court of Appeals clearly indicated its intent to maintain a close and continuing scrutiny of the agency action mandated in the threshhold decision 417 F.2d 972 (Pet. App., pp. 172a-173a).

The Court of Appeals, while it denied the "motion"* (thereby setting the stage for this Petition for Certiorari) did so not as a result of any jurisdictional misgivings on its part—to the contrary, the order in its abundance affirms this jurisdiction by precluding *any* remand to the district court (Pet. App., p. 1).

Respondent counsel continues to view the case as "unripe" in that it does not meet a test for finality after 6 years of litigation in the Federal Courts and 9 years after litigation in the Federal Maritime Commission; citing *Boston Marine Terminal Association* v. *Rederiakiebobloget Transatlantic*, 400 U.S. 62, 71. Counsel ignores the interpretation of Section 10(c) 5 U.S.C. § 704 in the decision in the Ninth Circuit in 1971 *United States* v *Consolidated Mines and Smelting Co., Ltd.*, 455 F.2d 432, 436, 439—wherein that court broke "new ground in holding that the doctrine of exhaustion of administrative remedies does not require completion of appellate or review proceedings within the agency."

Indeed, the Maritime Subsidy Board itself has recently been defeated in United States District Court for the District of Columbia in *American Maritime Association* v. *Blackwell, et al.*, Civil Action No. 1576-72 (see Pet. App. E, p. 9a) on this very issue. The Court cited this very decision. The Board did not appeal.

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* Petitioner's Appendix 119a-120a.

This case is not distinguishable. In this case the Board by letter to Michael McMorrow Public Counsel (see App. F., p. 10) held as "unfinal" and "inoperative" only its decisions on *liability* for the violation. The finding of violation of the act itself was no longer preliminary but "operative" and final.

The question presented in this petition 73-229 specifically addresses itself to the Board's lack of discretionary power on the liability issue. It is ripe for review.

CONCLUSION

For the added reasons set forth above the petition for certiorari should be granted.

Respectfully submitted,

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September 26, 1973

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-229

MARSHALL P. SAFIR,

Petitioner,

—v.—

ROBERT W. BLACKWELL, Assistant Secretary of Commerce for Maritime Affairs, Successor to and Substituted for ANDREW GIBSON; JAMES S. DAWSON, JR., Secretary Maritime Subsidy Board and FREDERICK DENT, Secretary of Commerce, Successor to and Substituted for MAURICE STANS,

Respondents.

PETITION FOR REHEARING OF ORDER ON PETITION FOR WRIT OF CERTIORARI

MARSHALL P. SAFIR, *Pro se,*
41 Flatbush Avenue,
Brooklyn, N. Y. 11217
(212) 858-2700

October 24, 1973

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-229

MARSHALL P. SAFIR,

Petitioner,

—v.—

ROBERT W. BLACKWELL, Assistant Secretary of Commerce for Maritime Affairs, Successor to and Substituted for ANDREW GIBSON; JAMES S. DAWSON, JR., Secretary Maritime Subsidy Board and FREDERICK DENT, Secretary of Commerce, Successor to and Substituted for MAURICE ETANS,

Respondents.

PETITION FOR REHEARING OF ORDER ON PETITION FOR WRIT OF CERTIORARI

In accordance with Rule 58, paragraph 2 of the Rules of the Supreme Court petitioner requests a rehearing on the grounds that since the time of the filing of the memorandum for the Federal respondents in opposition and the denial of the petition for writ of certiorari on October 23, 1973 that the final order of the Maritime Subsidy Board in S-243 was served.

Since the major objection expressed by the Solicitor General to the grant of certiorari was based on the posture of unfinality of the April 16, 1973 order of the Maritime Subsidy Board, the Order of October 10, 1973 served October 15, 1973 now meets the test for finality. The Solicitor General points to *Boston Marine Terminal Association* v. *Rederiaktiebobolaget Transatlantic,* 400 U.S. 62, 71—in his brief in opposition. It can now be stated that the process of administrative decision making has reached a stage where judicial review will not disrupt the orderly process of adjudication and the rights and obligations have been determined and legal consequences flow from the Agency action.

The final decision in S-243 is attached hereto as Supplemental Appendix Exhibit 15.

Petitioner prays that his petition for rehearing on the order be granted and certifies that it is presented in good faith and not for delay and that the petition for rehearing is restricted to the grounds above specified.

Respectfully submitted,

MARSHALL P. SAFIR,
Pro se.

SUPPLEMENTAL APPENDIX EXHIBIT 15

U.S. DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION
MARITIME SUBSIDY BOARD

DOCKET NO. S-243

Investigation of Alleged Section 810 Violation

In the matter of the complaint of Sapphire Steamship Lines, Inc. re alleged violation by Atlantic and Gulf American Flag Berth Operators (AGAFBO) of Section 810 of the Merchant Marine Act, 1936, as amended.

FINAL ORDER ON RECOVERIES

Chairman, Robert J. Blackwell and Alternate Member, James S. Dawson, Jr.

Introduction

On April 16, 1973, the Maritime Subsidy Board (Board) served an Opinion and Order in this proceeding[1] which concluded that all respondent members of Atlantic and Gulf American Flag Berth Operators had violated Section 810 of the Merchant Marine Act, 1936, as amended (Act), by certain actions which unjustly discriminated and unfairly competed against Sapphire Steamship Lines Inc. That de-

[1] The Opinion and Order is reissued on this service date to reflect corrections for clerical errors appearing in the original served decision. It is attached as an Appendix to this Final Order on Recoveries.

cision also set forth, on an estimate basis only, the operating-differential subsidy (ODS) recoveries, if any, owed by each respondent, for such violations upon due consideration of mitigating circumstances. Trade respondents—American Export Lines, Inc. (AEL), Bloomfield Steamship Company (Bloomfield), Lykes Bros. Steamship Co., Inc. (Lykes), Moore-McCormack Lines Incorporated (Mormac), and United States Lines, Inc. (USL)—and Public Counsel were given an opportunity to submit their views and supporting documentation on the exact ODS amounts recoverable under said decision. All trade respondents filed such submissions and most of them filed statements requested by Public Counsel on the source and availability of documents supporting their recovery positions. Public Counsel directed a MarAd audit of the submissions of the trade respondents based on the limited available existing records. He thereafter filed a Final Report, twice supplemented, which included the reports of such audit and which responded to the submissions of the trade respondents. Upon consideration of these papers, we find and conclude, for the reasons set forth hereinafter, that trade respondents owe in ODS recoveries for violation of Section 810 of the Act, as found in the Opinion and Order served April 16, 1973, an aggregate of $2,388,463.16.

Discussion

We consider first the propriety of issuance of this Order at this time and thereafter the ODS recovery from each of the trade respondents separately. It is understood that the positions on recoveries by all the trade respondents are without prejudice to their contentions of not having violated Section 810 of the Act.

Propriety of This Order at This Time

We are cognizant of the outstanding petition of Marshall P. Safir to the Supreme Court of the United States for a writ of certiorari to the Second Circuit to reverse that lower

court's order denying Mr. Safir's petition to reverse the Opinion and Order served April 10, 1973. (sic.) There is no judicial action in connection with that unresolved petition that precludes the issuance of this Final Order.[2] In fact, the Board is under a judicial order on mandate to proceed "without delay" with this decision.[3]

AEL's Recovery

AEL states that it "has established that the Board's approximate mathematical calculation is exact and that under the formula AEL should return $38,036 to the Government." Public Counsel laments the lack of original records from which to verify AEL's figures but suggests that if such records were not promptly located, then final figures be determined from the audit report of AEL's submission.

The MarAd audit report concluded that AEL's submission could not be verified because of the lack of supporting data, such as individual manifests and bills of ladings, from which AEL's submission was drawn. AEL indicated it is still in the process of locating such data. The audit report also claimed AEL's maintenance and repair ODS figure was understated by $1,695.10 resulting in understatement of subsidy due for violation of Section 810 of $14.25 (13.5% of $1,695.10 times 24.92% military cargo percentage, less 25% mitigation reduction). AEL has not commented on this correction asserted by MarAd's auditors.

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[2] The Safir petition would not stay the action of the lower court unless the Supreme Court or the Court of Appeals so directed, 28 U.S.C. § 2101(f) (1970). Neither the Supreme Court nor the Court of Appeals have so directed. Even if the lower court's order were stayed, it is doubtful that such stay would bar the Board from proceeding in the absence of some judicial communication to MarAd, the Department of Commerce, or the Department of Justice.

[3] *Safir* v. *Gibson*, 432 F.2d 137, 143 (2d Cir.), *cert. denied*, 400 U.S. 942 (1970), Order on Mandate of the U.S. Court of Appeals for the Second Circuit, Docket 680643 (E.D.N.Y. 1970).

We find and conclude that AEL owes an ODS recovery of $38,050.25 for violation of Section 810. In the event additional pertinent records are uncovered subsequent to this order, which would provide a basis for substantially changing the exact ODS recovery from AEL, then AEL's recovery can be reopened. Such eventuality seems extremely unlikely given the fact that such records are now several years old with all the sundry happenstances that could have occurred to them and also given the amount of effort purportedly already exerted to locate such records.

BLOOMFIELD'S RECOVERY

Bloomfield claims that it owes $119,900.54 as ODS recovery under the Board's Opinion and Order as compared to the $140,450 estimated by the Board in that decision. It contends that any recovery is subject to interest payments owed by the Government for withholding from Bloomfield $121,893.67 in ODS payments accrued in 1965. Public Counsel supports the MarAd auditor's report on Bloomfield's submission. The report indicates that there were insufficient supporting data available to express an opinion as to the overall accuracy of the submission, but that to the extent Bloomfield's manifests were available they confirmed that company's recitation of cargo reports.

Bloomfield's claimed recovery excludes any consideration for revenue earned from military cargo carriage at undisputedly lawful rates during the period of violation of Section 810. Bloomfield, along with Lykes and Mormac, argues that under the rationale of the Board's decision such revenue was to be excluded in calculating the ODS recovery. The applicable principle of the Board's decision, according to Bloomfield, is that "the penalty should bear the same percentage to accrued subsidy for the violation period as earnings from all cargo carried at the alleged illegally reduced rates bear to earnings from all cargo." Lykes adds that the Board assumed there was no such military cargo

whereas in fact such cargo was carried "at the constant rate levels which did not unfairly affect the Sapphire operation." Public Counsel indicates that such adjustments advocated by Bloomfield, Lykes and Mormac "appear to be refinements of the principle enunciated by the Board in the outstanding Opinon and Order . . . ."

The adjustment sought by Bloomfield, Lykes and Mormac is not a refinement of any principle previously established in this proceeding. In the Opinon and Order we made the legal conclusion that under Section 810 all ODS paid during past violations may be recovered and that we have discretion to mitigate such recoveries. The recoveries for all trade respondents were mitigated to the following percentage formula of ODS:

> "After carefully considering all of the facts and policy objectives of the Act applicable to trade respondents' violations, we are persuaded to further limit their recovery to the same percentage of specified ODS payments as military cargo revenues bore to total revenues on the trade route whereon the condemned rate reductions were in effect." (p. 61)

This formula was restated for Lykes as follows:

> "Hence, the amount to be recovered from Lykes is the percentage of ODS receivd from subsidized operations on the U.K./B-H range, as represented by the ratio of military cargo revenue received on such route to total revenues received therefrom during the period of violation." (p. 62)

The underlying principle of this formula is that recoveries would be mitigated to a certain level—a ratio of ODS involving all military cargo revenue received on the route during the violation.

Further, at the time of the Opinon and Order the Board was aware that its formula took into account some military

cargo by trade respondents at lawful rates even though the exact quantum of that carriage was not of record. For instance, the Board's decision referenced condemned military cargo rate reductions which occurred "during" the period March 29, 1965 to March 1, 1966; the Chief Judge's Initial Decision and the FMC decision in Docket No. 65-13[4] referred to several condemned military rate reductions that occurred subsequent to March 29, 1965; and Public Counsel, in particular discussed these other condemned military rate reductions in his proposed Findings of Fact at 20-21. It follows that it was apparent that some military cargo was carried by respondents after March 29, 1965, at lawful rates before the rates on such cargo were unlawfully reduced. However, preponderantly trade respondents carried military cargo at the condemned rate reductions on the Bordeaux/Hamburg range during the period of violation.

Moreover, we are not persuaded to extend further our discretion in this instance to reduce the recoveries owed by trade respondents for violation of Section 810. In the Opinion and Order we carefully considerd all the asserted justification for such mitigation and no new justification is presented by trade respondents in their latest submissions.

Bloomfield also asserts that the Board owes interest under its ODS Contract No. FMB-27 on the final audited subsidy voucher for $121,893.67 from June 1966 (the date of submittal of "a voucher for the remaining subsidy due") to June 1971 (the date of a court order enjoining subsidy payment[5]) and beyond. The subsidy contract requires payment of net subsidy due upon final accounting which shall be paid as soon as practicable upon termination of the subsidy agreement. Bloomfield claims that administrative

[4] Docket No. 65-13, *Rates on Government Cargoes, 11 F.M.C. 263, 287 (1967).*

[5] Memorandum Incorporating Findings of Fact and Order dated June 22, 1971, and resettled July 26, 1971 (E.D.N.Y.).

agencies can and do permit interest to be taken into account in making contract adjustments and settlements and that interest is assessed when the Government fails to fulfill its obligation as in this instance.

Public Counsel contends that the applicable voucher was dated January 23, 1970, after commencement of this proceeding, and that such voucher included the recital by Bloomfield that all terms of the subsidy contract had been complied with. He argues that since the purpose of this proceeding was to determine whether Bloomfield was in compliance with its contract and since Bloomfield was in defunct status, there was ample basis under the contract to give the voucher cautious consideration. Further, he cites the statutory provision that interest is not assessed against the Government except where explicitly allowed by statute or contract, 28 U.S.C. §§ 2411, 2516 (1970), and distinguishes cases cited by Bloomfield. He asserts that neither Bloomfield's subsidy contract nor any implementing regulations permit recognition of interest in the event that a final accounting is not processed immediately for payment.

We completely concur with Public Counsel's position on this matter that there has been no improper or illegal withholding of subsidy and that no statute, subsidy contract, or implementing regulation permits recovery of interest against the Government for such withholding.* Consistent with this

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*Bloomfield cites *Bell* v. *United States*, 404 F.2d 975, 984 (Ct. Cl. 1968), and *Peoria Tribe of Indians of Oklahoma* v. *United States*, 390 U.S. 468 (1968). In *Bell* the Court of Claims found that the contract under Department of Defense policy permitted recovery of interest under the changes clause on moneys borrowed by the contractor necessitated by the change. Neither the Department of Commerce nor MarAd have a policy of permitting recovery of interest under construction or operating subsidy contracts. See *Sun Shipbuilding & Dry Dock Company* v. *United States Lines, Inc.* 12 S.R.R. 551, 598 n. 39 (1971). In *Peoria* the Supreme Court did not allow interest as part of damages for the

[Footnote continued on next page]

view we concluded in the outstanding Opinion and Order that interest charges are not recoverable under Section 810 of the Act since interest is not and cannot be an element of ODS payment.

In conclusion, we find that Bloomfield owes $139,039.60 in ODS recovery for violation of Section 810 of the Act ($750,551.12 ODS times 24.7% military to total freight revenues times 75% mitigation reduction) and that no interest payments from the Government for withholding accrued subsidy offsets that recovery. The withheld $121,893.67 in ODS payments is hereby acknowledged as partial satisfaction of amounts owing for such violation.

LYKES' RECOVERY

Lykes calculates the ODS recovery due the Government in this proceeding is $764,264.53 compared to the estimated recovery of $1,130,123 in the Board's decision. The difference is attributed to more exact figures and calculation of ODS on a per diem rather than on a termination basis. Lykes contends the recovery should be reduced to $703,920.67 so as to exclude any subsidy paid for carriage of military cargo not carried at the condemned reduced rates. Public Counsel adopts the MarAd audit report on Lykes' submission, which report, except for a minor correction, concludes that Lykes' submissions properly reflect the amount of subsidy subject to recovery in this proceeding. The one correction refers to Lykes' overstatement of subsidy by approximately $5000. Taking into account the correction, Lykes would owe in recovery, based on the Board's Opinion and Order, $762,891.99 ($2,725,587.69 ODS times 27.99% military to total freight revenues ratio).

Government's breach of its fiduciary obligations under treaty since "the United States is not liable for interest on judgments in the absence of an express consent thereto. . . ." 390 U.S. at 473 n. 6. It therefore suggested that if an interest rate *measure* were adopted for determining the damages, it must be simple and not compound interest.

We have previously discussed and decided not to accept the advocated adjustment for revenue from carriage of military cargo at lawful rates during the period of violation. As for Lykes' different method of accounting we note that the accounting bases for all trade respondents vary considerably. However, these different bases have been reviewed by MarAd auditors, who have concluded, to the extent underlying data is available, that each submission is reasonably responsive to the directive in this proceeding. We concur with that judgment. Accordingly, we find and conclude that Lykes owes $762,891.99 in ODS payments for violation of Section 810.

MORMAC'S RECOVERY

During the period of violation Mormac operated on Trade Route No. 6 with the authority to make calls on ports in the Bordeaux-Hamburg range (Trade Route 7-8-9) in certain instances. Mormac suggests that the subsidy paid for operation on the Bordeaux-Hamburg range be computed from the ratio of revenue carried on that range to the revenue earned on the entire trade route (T.R. 6-7-8-9). On such basis it calculates the ODS recovery under the Board's outstanding Opinon and Order as $281,497 instead of the Board estimated recovery of $492,443. Mormac's calculation includes three adjustments to eliminate (i) revenue from cargoes carried on unsubsidized voyages during the strike period in June, July and August of 1965, (ii) revenue from carriage of refrigerated cargoes at lawful rates on the Bordeaux-Hamburg range, and (iii) revenue from other military cargo carried at lawful rates on the Bordeaux-Hamburg range. Public Counsel offers no objection to Mormac's proposed recovery and relies on the MarAd audit report of Mormac's submission. MarAd's auditors concluded that Mormac's submission was a reasonable representation of the data required in this proceeding although they could not give complete verification in the absence of certain underlying data.

As previously discussed, we have already decided not to make any adjustment in recoveries for carriage of military cargoes at lawful rates on the Bordeaux-Hamburg range during the period of violation. On the other hand, we are persuaded to make an adjustment in Mormac's recovery for revenues earned from cargoes carried on unsubsidized voyages during the strike period. No Government support was paid for such operation and Mormac held no advantage over Sapphire Steamship Lines Inc. by such unsubsidized operation.

With respect to Mormac's recovery and military reefer cargo the Board made the following statement in its Opinion and Order:

> "The military cargo revenue figures include revenue from carriage of military refrigerated cargo since we are not persuaded to further mitigate Mormac's recovery to exclude such cargo, even though Sapphire's carriage of such cargo was of a limited amount." (p. 65, note 63)

The essential point is that the Board refused to further exercise its discretion to limit Mormac's recovery on account of this reefer carriage. Mormac may be contending that the amount of Sapphire's carriage of this cargo is relevant because Sapphire could not have sustained any injury from Mormac's military reefer carriage and therefore its recovery should be accordingly mitigated. The reference to the "limited amount" of military refrigerated cargo carried by Sapphire was to Mr. Safir's testimony that a Sapphire vessel had carried a reefer container (which presumably contained refrigerated cargo) although the Sapphire ships did not have reefer capacity built into them. However, the quantity of military refrigerated or reefer cargo carried by Sapphire is not relevant because we have already held that, "even as a factor of mitigation, . . . [t]his proceeding is not concerned with the injury to Sapphire" but rather with "poli-

cies regarding recoveries from respondents for actions intending injury to Sapphire and affecting the welfare of the U.S. merchant marine."[1] Mormac's analogy to the following finding on USL's passenger service is not apposite:

> "In view of the dissimilarity of passenger and cargo ship operations and of Sapphire having operated no passenger ships, we are persuaded, as a matter of discretion, that recovery from USL for past violation of Section 810 should not be related to subsidies received for such passenger ship operations. No other trade respondent operated any passenger ship on a subsidized service on the U.K./B-H range during the period of violation." (p. 53)

This unique circumstance is not comparable to Mormac's carriage of military reefer cargo. Mormac did not have a military reefer service but rather presumably a commercial freight service. USL had a passenger service.

Accordingly, we find and conclude that Mormac owes for violation of Section 810 of the Act $386,776.56 in ODS recovery ($968,091 ODS times 53.27% military [$2,454,640] to total freight revenues [$4,607,384] ratio times 75% mitigation reduction), which amount will be withheld from the ODS accrued during the period of violation and not yet paid pursuant to court injunction.

USL's Recovery

USL calculates its recovery as $1,056,074.62 as contrasted to the estimated recovery of $969,751 in the Board's Opinion and Order. Public Counsel supports the MarAd audit report of USL's submission and recommends that the Board not await the possibility of further USL records being located but urges that the final decison be issued "subject to reopening in the event such records are re-

[1] Opinion and Order, served April 16, 1973, at 36.

trieved." MarAd auditors could not certify to the complete accuracy of the USL submission because of the absence of underlying manifests and bills of ladings but did conclude that the submission, with minor adjustments, was a reasonable representation of the data required in this proceeding. The significant correction concerned revenue statements. The auditors used figures reflected in the applicable Estimated Operating Result Statements while USL relied on data in Vessel Operating Statements. The latter Statements have apparently been destroyed in the ordinary course of USL's business. The net effect of this procedure was to increase the subsidy applicable to military cargo by $9,665.53 or a recovery of $1,061,704.76.

We find and conclude that USL owes $1,061,704.76 for violation of Section 810 of the Act, based to the extent possible, on existing records. As in the situation of AEL, this determination is final but if additional pertinent records should unexpectantly be uncovered which would materially change USL's recovery, that recovery can be readjusted.

CONCLUSION

Based upon the Opinion and Order served April 16, 1973, in this proceeding and the foregoing discussion, we find and conclude that:

1) All respondents violated Section 810 of the Merchant Marine Act, 1936, as amended, and applicable provisions of their ODS contracts by acting in concert to reduce rates on selected military cargo carried in the U.S. Atlantic & Gulf to United Kingdom/Bordeaux/Hamburg area and holding such rates at such levels during the period of March 29, 1965 to March 1, 1966 (but as to respondent Bloomfield Steamship Company, only until and including December 31, 1965) in order to unjustly discriminate and unfairly compete against Sapphire Steamship Lines Inc., and

2) In consideration of pertinent mitigating circumstances respondents owe the following ODS recoveries, if any, subject to readjustment upon the unlikely discovery of additional pertinent documentation which would substantially alter said recoveries:

   (a) Respondents American President Lines, Ltd., Farrell Lines Incorporated, Grace Lines, Inc. (presently Prudential-Grace Lines, Inc.) and Prudential Lines, Inc. (presently Prudential Steamship Company, Inc.), who did not compete with Sapphire and whose violations are technical only, no amount;

   (b) Respondent Lykes Bros. Steamship Co., Inc. $762,891.99 to be accounted for on terms satisfactory to the Government;

   (c) Respondent American Export Lines, Inc. $38,050.25 to be accounted for on terms satisfactory to the Government;

(d) Respondent Moore-McCormack Lines, Incorporated $386,776.56 to be withheld from operation subsidy amounts presently owed and incurred during the period of violation;

(e) Respondent Bloomfield Steamship Company $139,039.60 partially to be withheld from operating subsidy amounts of $121,893.67 accrued during the period of violation but not yet paid;

(f) Respondent United States lines, Inc. $1,061,704.76 to be accounted for on terms satisfactory to the Government.

SO ORDERED BY THE
MARITIME SUBSIDY BOARD/
MARITIME ADMINISTRATION
Date: October 10, 1973

/s/ AARON SILVERMAN
AARON SILVERMAN
Assistant Secretary